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No. 2387

United States
Circuit Court of Appeals

For the Ninth Circuit.

CACHE CREEK MINING COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

HENRY BRAHENBERG,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska, Third Division.

FILED

APR 16 1914

Records of H. S. Vincent
out of appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court for the Territory of Alaska,
Third Division.*

Names and Addresses of Attorneys of Record.

WM. A. GILMORE, 300 Central Bldg., Seattle,
Wash.,

JOHN LYONS, Valdez, Alaska,
Attorneys for Plaintiff and Plaintiff in
Error.

E. E. RITCHIE, Valdez, Alaska,
Attorney for Defendant and Defendant in
Error. [1*]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S.—33.

CACHE CREEK MINING COMPANY, a Corpo-
ration,
Plaintiff,

vs.

HENRY BRAHENBURG,
Defendant.

Complaint.

The plaintiff for its cause of action against the de-
fendant complains and alleges:

I.

That this plaintiff now is and during all of the
times hereinafter mentioned was a corporation duly
and legally organized and existing under and by vir-

*Page-number appearing at foot of page of original certified Record.

tue of the laws of the State of Washington, with its principal place of business in Seattle; that it has property and business in the Territory of Alaska, and that it has complied with all the Alaskan laws regarding foreign corporations of the Territory of Alaska, and that C. E. Brown of Seward, Alaska, is its duly authorized agent and officer upon whom may be served all legal processes and notices found necessary to be served in order to obtain jurisdiction of this plaintiff in any court action.

II.

That heretofore, to wit, on July 28, 1905, one Joseph Anderson located in his own name and right, in manner and form as provided by law, Claim Number One above on Dollar Creek, a tributary of Cache Creek in the Yentna mining district of Alaska; that due notice thereof was given and that said location was by the Commissioner regularly received and filed, and is now recorded in Book 1 at page 60 of the Commissioner's office at Susitna; that thereafter the said Joseph Anderson, for a valuable consideration, transferred, sold and set over unto this plaintiff [2] all of his right, title and interest therein, and thereto, and this plaintiff thereon became the owner thereof and since it has acquired same has been entitled to all of the possessory rights and mining rights thereto and therein under the laws of the United States of the Territory of Alaska, and that this plaintiff has in each year since said time, in due and regular form and manner, done, made and performed the full amount of the assessment work and development work upon said mining claims as is required by ex-

isting laws, and that proof thereof has been on each year regularly filed, and is now on file in the office of the Commissioner of the United States Court in the said town of Susitna in said District.

III.

That heretofore, to wit, in the year 1912, at a date unknown to this plaintiff, the defendant, Henry Brahenburg, did trespass upon, go upon and unlawfully, wrongfully, without any right or any legal authority in law so to do, attempt to and did "jump" and take possession of all the premises above described, the same being the property of this plaintiff, and that he, the said defendant, did wrongfully continue to hold and still holds the possession thereof, and did commence to work on said claim by sluicing out a cut, putting in flumes, and commenced to and did sluice, pan and mine and otherwise seek to and did extract gold and precious minerals from the earth on said claim, all of the property of this plaintiff, to this plaintiff's damage in the sum of Five Thousand (\$5,000.00) Dollars.

IV.

That the defendant still threatens to and continues to do such sluicing and mining upon the said claim aforesaid, the property of the plaintiff, which the plaintiff alleges to be valuable property upon which it has expended large sums of *of* money, time and labor, and that it would suffer thereby irreparable [3] losses for which there is for this plaintiff no adequate remedy in law save that of a restraining order and injunction from this Honorable Court commanding and prohibiting the said defendant from

going upon said premises, to engage in sluicing and mining thereon and in otherwise take gold or other precious minerals from the earth upon said claim.

V.

Plaintiff alleges that the defendant is insolvent and that no money judgment could be collected; that this plaintiff has not a full and complete and adequate remedy at law whereby it could be reimbursed and made whole for any trespassing upon said claim by the defendant; that this plaintiff will suffer irreparable losses and a great injustice unless this action is assisted in equity and a restraining order issued from this Court prohibiting the defendant, his associates, agents, servants and employees or anyone claiming under him or through him, as licensee or otherwise, from going upon, or remaining upon the premises of this plaintiff hereinbefore described.

VI.

This plaintiff alleges that the defendant has mined and sluiced from said premises fully ten thousand cubic square yards, which is of the reasonable value of fifty cents per yard, whereby this plaintiff has become damaged in the sum of Five Thousand (\$5,000.00) Dollars.

WHEREFORE, this plaintiff prays this Honorable Court as follows:

First: For a writ of ouster forever ejecting the defendant, his associates, agents, servants and employees or any person or persons whatsoever claiming under or through him, from going upon, mining or in any otherwise interfering with said premises.

Second: That until the final determination of this

action that this plaintiff have a restraining order or [4] temporary injunction restraining and enjoining the defendant, his associates, agents, servants, and employees from going upon said premises or continuing to mine thereupon or in any wise interfere therewith.

Third: For a judgment against the defendant for plaintiff's damage in the sum of Five Thousand (\$5,000.00) Dollars and finally for all other and further relief to which this plaintiff may in law and equity be entitled.

BROWN & LYONS,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

I, Joseph Anderson, being first duly sworn depose and say: That I am the manager of the Cache Creek Mining Co., the plaintiff named in the above-entitled action, and that the foregoing Complaint is true as I verily believe.

JOSEPH ANDERSON.

Subscribed and sworn to before me this 27th day of March, A. D. 1913.

[Seal]

JOHN LYONS,
Notary Public for Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. March 27, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

*In the District Court for the Territory of Alaska,
Third Division.*

No. S.—33.

CACHE CREEK MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

HENRY BAHRENBURG,

Defendant.

Answer.

Answering plaintiff's complaint defendant says:

I.

He neither admits nor denies the allegations of paragraph I.

II.

He admits that Joseph Anderson located Claim Number One above on Dollar Creek, and that he thereafter conveyed his interest in said claim to plaintiff, as alleged, but denies that plaintiff has performed the annual labor required by law to hold said claim since the year 1909, denies that it has performed any labor upon said claim since 1909, and alleges that all of plaintiff's right to and in said claim became forfeited and the said claim and all of it became a part of the public domain, subject to location according to law as mineral land long prior to the year 1912. Defendant alleges that on the 1st day of August, 1912, he located said Claim Number One above discovery on Dollar Creek according to law, and ever since has been and now is the owner

thereof, subject to the paramount title of the United States, and is in actual possession thereof.

III.

Defendant admits that he went upon said claim in the year 1912, as stated in the preceding paragraph, but denies [6] that he was a trespasser, that his said action was unlawful or wrongful, or without authority in law; denies that he “jumped” said claim, or any part thereof; denies that it was the property of plaintiff, or is now. Defendant admits that he holds possession of said claim but denies that he holds it, or any part of it, wrongfully. He admits that he has done mining work on said claim, but denies that he extracted therefrom any gold or other precious mineral which was the property of plaintiff; denies that the gold and other mineral extracted from said claim by him was so taken to the damage of plaintiff in the sum of Five Thousand Dollars, or any other sum.

IV.

Defendant denies that plaintiff has expended large sums of money, time and labor, or any money, time or labor whatever, upon said claim Number One; denies that by reason of or through defendant’s mining or other operations on said claim it will suffer irreparable losses, or any loss whatever; denies that plaintiff has no adequate remedy at law for any damage it may suffer in the premises.

V.

Defendant denies each and every, all and singular, the averments of paragraph V of plaintiff’s complaint.

VI.

Defendant denies that he has mined and sluiced from said claim ten thousand cubic square yards, or cubic yards, or any other quantity exceeding Five Hundred and Sixty-three (563) cubic yards of earth, gravel and rock; denies that the earth, rock and gravel removed was or is of the value of fifty cents a yard, or any other sum in excess of two dollars for the whole quantity mined and sluiced. He denies that by such mining and sluicing plaintiff was damaged five thousand dollars or any sum whatever.

By way of cross-complaint defendant alleges that [7] he located said Claim Number One above discovery according to law, and thereafter within ninety days, to wit, on the — day of August, 1912, filed a copy of his notice of location thereof in the office of the recorder of Cook Inlet precinct, in which said claim is situated, and has ever since said location had actual possession of the same.

Wherefore defendant prays that plaintiff take nothing by its complaint and that on the final hearing of this cause he may be decreed to be the owner of said Claim Number One, subject only to the paramount title of the United States, and that plaintiff has no interest therein, and that defendant have such other and further relief as the Court may find him entitled to in equity and good conscience.

E. E. RITCHIE,

Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

Henry Bahrenburg, being duly sworn, says that he

is the defendant in this suit; that he has read the foregoing answer and he believes the same to be true.

H. BAHRENBURG.

Sworn to and subscribed before me this 2d day of June, 1913.

[Seal]

W. H. CRARY,
Notary Public.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 2, 1913. Angus McBride, Clerk. By V. A. Paine, Deputy. [8]

*In the District Court for the District of Alaska,
Third Division.*

CACHE CREEK MINING COMPANY, a Corporation,

Plaintiff,

vs.

HENRY BAHRENBURG,

Defendant.

Reply.

The plaintiff for Reply to the affirmative matter set up in defendant's answer herein, says and alleges:

First: It denies each and every allegation and averment in said affirmative answer contained.

Wherefore plaintiff prays judgment as in its complaint prayed for.

BROWN & LYONS,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 3, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

United States of America,
Territory of Alaska,—ss.

I, M. McDougal, being first duly sworn, depose and say: That I am the President of the plaintiff corporation named in the above-entitled action, and that the foregoing Reply is true as I verily believe.

M. McDOUGALL.

Subscribed and sworn to before me this 2 day of June, A. D. 1913.

[Seal]

GEO. J. LOVE,
Notary Public for Alaska. [9]

[Defendant's Exhibit No. 1 —Photograph.]



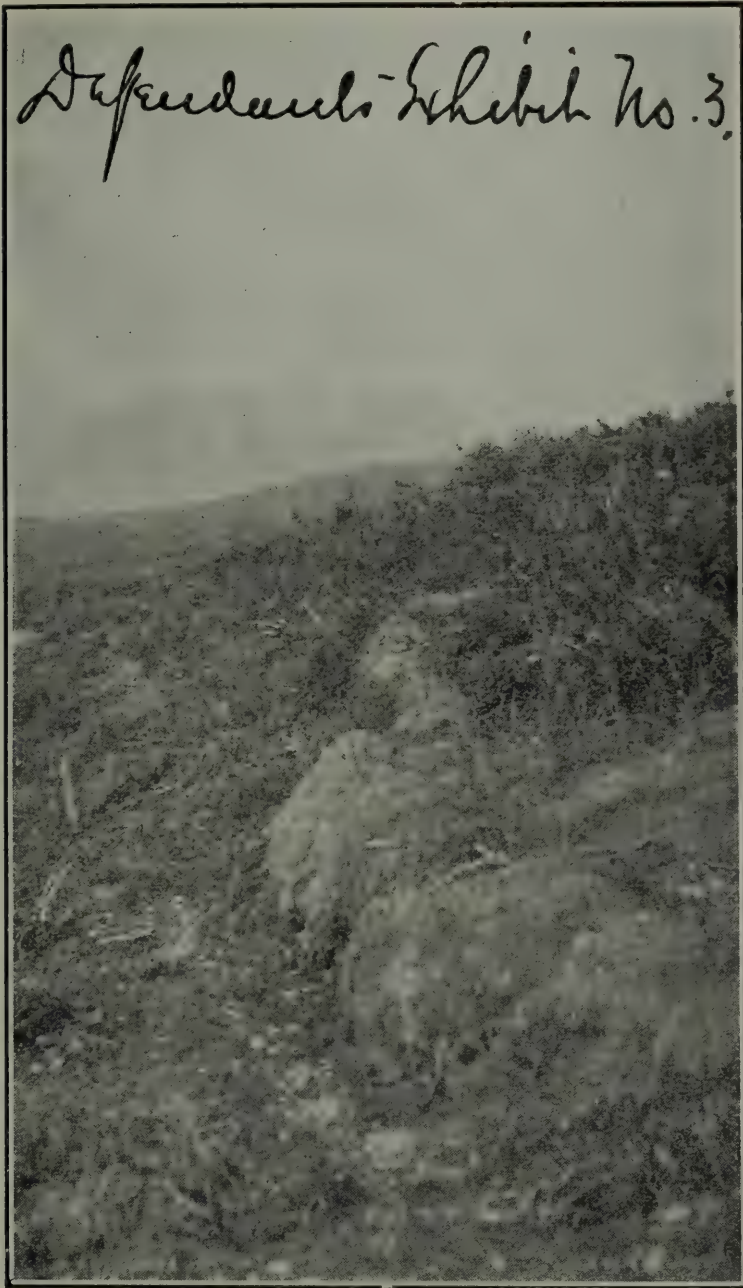
[Endorsed]: No. 2387. United States Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit No. 1. Received March 10, 1914. F. D. Monckton, Clerk.

[Defendant's Exhibit No. 2—Photograph.]



[Endorsed]: No. 2387. United States Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit No. 2. Received March 10, 1914. F. D. Monckton, Clerk.

[Defendant's Exhibit No. 3.—Photograph.]



[Endorsed]: No. 2387. United States Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit No. 3. Received March 10, 1914. F. D. Monckton, Clerk.

**Defendant's Exhibit No. 4 [Notice of Location of
Placer Claim].**

NOTICE OF LOCATION OF PLACIER CLAIM.

Notice is hereby given. That the undersigned having complied with the requirements of Chapter 814 of Title Thirty-two of the Revised Statutes of the United States and local customs laws and regulation has located this 20 acres of Placier mining ground situated in the Cooks Inlet Mining District, Alaska, described as follows commencing at this upper center line post No. 1 running down the stream 1320 feet to lower center line post No. 2 with 330 feet on each side of center line. Said claim being known as No. 1 above situated on Dollar Creek about five miles from its mouth tributary to Cache creek.

Discovered August 1, 1912.

Located August 1, 1912.

Locator—H. BAHRENBURG.

Witness:

Aug. 1st. LOUIS BUB.

[Endorsed]:

123.

United States of America, Territory of Alaska,
Third Division.

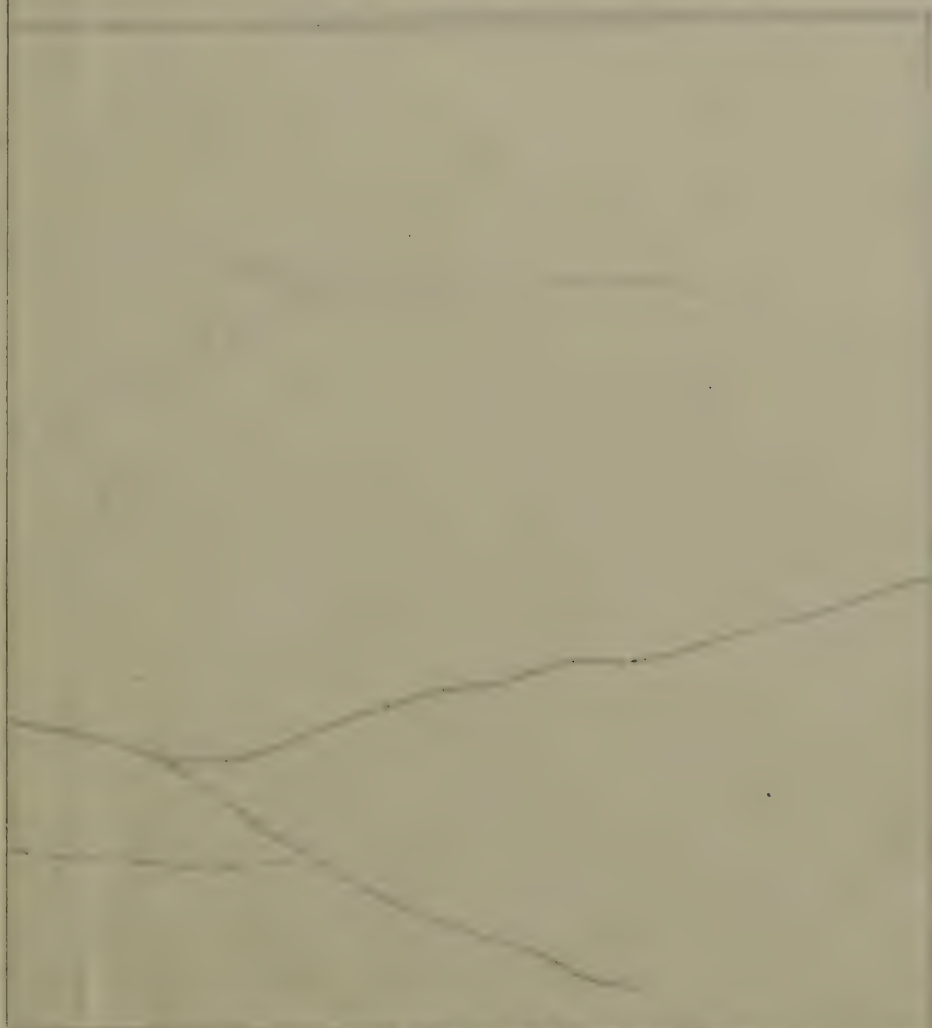
Filed for record at request of H. Bahrenburg, on the 31 day of Aug. 1912, at 17 minutes past 4 P. M., and recorded in volume 2 of Min. Loc., page 630, records of Cook Inlet, Precinct Alaska. Lee Van

Slyke, U. S. Commissioner and Ex-officio Recorder.
Deputy —————.

Indexed. [In pencil:] Aug. 31st, 4:17 P. M.

No. 2387. U. S. Circuit Court of Appeals for the
Ninth Circuit. Defendant's Exhibit No. 4. Re-
ceived March 10, 1914. F. D. Monckton, Clerk.

a.



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May 2, 1961

સાચી રજીસ્ટ્રારી
સાચી રજીસ્ટ્રારી, સાચી રજીસ્ટ્રારી

સાચી રજીસ્ટ્રારી



CACHE CREEK MINING CO. v. BRAHEN-
BURG—S/33. [10]

*In the District Court for the Territory of Alaska,
Third Division.*

No. S/33.

CACHE CREEK MINING COMPANY, a Corpo-
ration,

Plaintiff,

vs.

HENRY BRAHENBURG,

Defendant.

Writ of Error and Transcript of Evidence.

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard on Tuesday, November 25, 1913, at 11 o'clock A. M., before the Honorable ROBERT W. JENNINGS, Judge of the District Court for the Territory of Alaska (assigned to the First Division and presiding in the Third Division at this time by direction of the Attorney General) and a Jury:

The plaintiff being represented by its attorney and counsel, JOHN LYONS, Esq.

The defendant being represented by his attorney and counsel, E. E. RITCHIE, Esq.

A jury having been empaneled opening statements were made by the respective counsel.

WHEREUPON the following additional proceedings were had and done: [11]

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[Testimony of Joseph Anderson, for Plaintiff.]

JOSEPH ANDERSON, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. LYONS.)

Q. What is your name? A. Joseph Anderson.

Q. What is your occupation? A. Miner.

Q. Where? A. The Cache Creek country.

Q. Do you know of the Cache Creek Mining Company, the plaintiff in this action? A. I do.

Q. What has been your relation to that company for the last three years?

A. I have been superintendent on the ground and manager.

Q. Where is this ground?

A. The claim in dispute—Number 1 above discovery on Dollar Creek.

(Testimony of Joseph Anderson.)

Q. What part of the country is it in?

A. It is in the Yetna Mining District on Dollar Creek, a tributary of Cache Creek.

Q. Territory of Alaska?

A. Territory of Alaska.

Q. I hand you this map—state what that is.

A. It is a map showing all of the claims on Dollar Creek owned by the Cache Creek Mining Company; also the claims on Falls Creek owned by the Cache Creek Mining Company and five locations on Cache Creek, together with the ditches on the ground, finished and unfinished.

Q. Who made that map? [13*—2†]

A. A civil engineer made a map same as this with the exception of the ditches which were filled in by George Eberhardt and myself.

Q. Who is George Eberhardt?

A. He is my partner, was my partner in the location of discovery and Number 1—one above on Dollar Creek, and a stockholder in the Cache Creek Mining Company.

Q. Does that map represent the true situation and location of the company's property on these different streams?

A. It does—it was made by a competent engineer.

Q. Who was he? A. Mr. Mattison.

Q. What is his entire name, if you know?

A. I don't remember that.

*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

(Testimony of Joseph Anderson.)

Mr. RITCHIE.—If it is a substantially accurate map there will be no objection to it.

The WITNESS.—It is a blue-print taken off the original map made by him.

Mr. RITCHIE.—We make no objection to the introduction of the map. We, of course, object to any testimony with reference to any claims not involved in this action, but no objection to the map.

The map is admitted in evidence, marked Plaintiff's Exhibit "A"—is attached hereto and made a part hereof.

Q. Do you know where the claim known as Number 1 above discovery on Dollar Creek, a tributary of Cache Creek, is? A. I do.

Q. Who is the locator of that claim?

A. I located the claim.

Mr. RITCHIE.—The pleadings admit Mr. Anderson located it and [14—3] afterwards conveyed it to the Cache Creek Company and that the company did own it a few years ago.

Q. How long have you been working for that company in that section of the country?

A. About the first day of June, 1911.

Q. Did you work for them prior to that time?

A. No—I did a very few days, just helping them to assemble an outfit when the company first went in there to take hold of the proposition.

Q. When were you over there in that country first? A. 1905.

Q. Were you there in 1906? A. Yes.

Q. What were you doing that year?

(Testimony of Joseph Anderson.)

A. Mining—working.

Q. Whom were you working for? A. Myself.

Q. You were not working for the company that year?

A. No. There was no such company that year.

Q. When was this company formed? A. 1909.

Q. Were you working for the company that year?

A. Only just to help to assemble the outfit at Susitna and Tyonook and get together.

Q. When did you first begin mining in that country for the company? A. In 1911.

Q. What did you do for the company in 1911?

A. I went in there as foreman in the spring, for the mining end of it and afterwards when Mr. Cameron left, I took [15—4] charge as superintendent.

Q. Who is Cameron?

A. He is one of the stockholders and general manager of the company in there at that time.

Q. Is he a stockholder in the company?

A. Yes, sir, he is a stockholder in the company.

Q. Where does he reside?

A. Seattle, Washington.

Q. What office does he hold with reference to the company? A. Secretary.

Q. Who is the president of the company?

A. Malcolm McDougall.

Q. Where does he reside? A. Seattle.

Q. How long did you mine there during the year 1911?

A. I don't know the date we started; they were

(Testimony of Joseph Anderson.)

mining when I arrived there the 26th of May and we closed down the last day of August, actual mining.

Q. How many claims do the company own in that section of country, if you know?

Mr. RITCHIE.—We object to that—it is irrelevant to introduce any testimony here except as to claims which would be connected with this ditch.

Objection sustained. Plaintiff allowed an exception.

Q. How many claims do the company own on Dollar Creek? A. Six.

Q. Now, will you get up there to that map and tell the jury just where those claims are?

A. These are the claims here—the Zero, Palouse, Boston, No. 1 [16—5] below, Discovery and No. 1 above.

Q. Where is that Number 1 above claim on Dollar?

A. Number 1 above discovery?

Q. Is that the claim in dispute in this action?

A. That is the claim in dispute.

Q. Did you do the assessment work on that claim in 1911? A. We did.

Mr. RITCHIE.—As that is preliminary I will not object.

Mr. LYONS.—We have the affidavits of labor here.

Mr. RITCHIE.—They were offered in evidence on the preliminary on injunction and I objected to them on the ground that they did not comply with the requirements of the statute.

By the COURT.—That question is not in issue

(Testimony of Joseph Anderson.)

now—the question is, did you do the assessment work.

Q. Did you do the assessment work on that claim in 1911?

A. I did, not on the claim, but by ditching above it.

Q. Tell the jury how the assessment work was done. Tell them first, where is the stream that is known as Dollar Creek.

A. It is up here—that is a mistake; there is no such branch there; I don't know how that was put in.

Mr. RITCHIE.—Start at the source of Dollar Creek and show how it runs.

Q. Where is the source of Dollar Creek?

A. Here; that is against the snow line. This is Cache Creek here.

Q. What is this other stream over on this side of the map?

A. This is one fork of Falls Creek and this is the other fork; that makes Falls Creek here, adjoining Cache Creek, here. [17—6]

Q. How did you do the assessment work for this claim in the year 1911?

A. By ditching on the bench.

Q. State to the jury where that ditch is on that map.

A. This is the complete ditch here, but it was not all done in 1911. This was done in 1911 (indicating).

Q. Where is the intake of that ditch?

A. There, it will be—it is not complete.

(Testimony of Joseph Anderson.)

Q. On what stream is that? A. Dollar Creek.

Q. How far is the intake of the ditch from Number 1 above on Dollar Creek, the claim in dispute?

A. Two miles approximately.

Q. Was this ditch surveyed?

A. It was not surveyed by an engineer; no.

Q. Was it surveyed?

A. There was a preliminary line run through with a sight level.

Q. Who did that? A. I done it.

Q. When did you do that? A. 1911.

Q. Tell the jury what work was done on the ditch in 1911—on the map there.

A. This is the work that was done, here—this ditch was dug.

Q. What length of ditch was dug in 1911?

A. I measured that with a steel tape this fall, but I left the book with a man I expected here.

Q. As near as you can state.

A. 1600 feet, I think, is the correct measurement—I said 1200 feet in the spring. [18—7]

Q. What time of the year 1911 was that work done? A. September.

Q. Now, what was done? Tell the jury what was done.

A. The outfit was packed up at Dollar Creek and packed over there with horses and that ditching was in about two feet wide on the bottom and 18 inches on the lower lip and considerably more in places on the upper lip, the upper side.

Q. How many horses were there? A. Three.

(Testimony of Joseph Anderson.)

Q. How far is it from where you took that outfit to where this ditch is situated?

A. It is about five miles.

Q. How many men were in the outfit?

A. Three besides myself.

Q. Do you know the names of those men?

A. I do.

Q. What were their names?

A. There was Victor Carlson, George Winter and Andy Thomas and Charley Nawn worked at the warehouse and camp, packing up the outfit and things like that; helped us pack the horses.

Q. You were there yourself?

A. I was there myself all the time.

Q. How long were you there?

A. May I refer to my notes?

Q. You may refer to anything you have to refresh your recollection.

The WITNESS.—(Referring to notes.) I was there the 1st, 2d, 6th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th of September.

Q. What is that you hold in your hand there? [19—8]

A. That is a copy I have taken from my books, from my log.

Q. What does your log consist of?

A. Putting down what we do every day and how the men are occupied, etc.

Q. Where is that log?

A. It is up in Cache Creek.

Q. You haven't that with you?

(Testimony of Joseph Anderson.)

A. I didn't bring it.

Q. Is that an exact copy of the log?

A. It is an exact copy.

Q. What did this outfit you took over there consist of?

Mr. RITCHIE.—I think that is irrelevant; the real question is what is the value of the work on the ground.

Objection overruled.

A. Do you want the rest of these names and the days' work?

Q. At this time I will ask another question and get that later. What did your outfit consist of?

A. It consisted of supplies to use in the cook-house, tents, stoves and everything to feed the men, a complete camp; horses, plows, scraper and tools, picks and shovels, etc., and everything that was needed to do that kind of work.

Q. I will ask you how many claims was this work to be applied on, as assessment work.

A. Six claims.

Q. On what stream? A. Dollar Creek.

Q. Is that all the property of the Cache Creek Mining Co.?

A. All the property of the Cache Creek Mining Company.

Q. Now, what time did you go to work in the month of September on this ditch? [20—9]

A. The 9th.

Q. The 9th of September?

A. The 9th of September.

(Testimony of Joseph Anderson.)

Q. You say you had three horses?

A. Three horses.

Q. How many days were they at work?

A. Nine days.

Q. What were those horses worth each per day in that country at that time?

A. I think I figured them at—

Mr. RITCHIE.—We object to what he figured them at—we want the prevailing rates.

By the COURT.—Answer what they were worth, if you know.

A. There was no prevailing price; there was nobody to use horses there and I figured on what they used in other places that was more accessible than that country is.

By the COURT.—That is the way you got at it?

A. That is the way I got at it.

By the COURT.—I think you may answer, subject to cross-examination, what in your opinion was the worth per day of the horses.

A. I will say roughly \$30 a day to the team of two horses.

Q. Then a horse, according to your way of figuring, was worth about \$15 a day in that country?

A. Yes, sir.

Q. Now, tell the jury how you arrive at those figures, as near as you can.

A. Well, I arrived at them in this way—I figured what it would cost to feed a horse in there and what the horse should be worth working there and what you would have to [21—10] pay for him using

(Testimony of Joseph Anderson.)

him in any other country that is as hard to get into as that is. I know you have to pay that for them in the Iditarod or any other place where they use teams.

Q. What is the price of hay in that country?

Mr. RITCHIE.—We object to that as irrelevant.

Objection sustained.

Q. Now, you say you went to work there along about the 9th of September? A. Yes, sir.

Q. How many men were actually working on the ditch and began to work on that day?

A. On that day there were four.

Q. What did they do, as near as you can recollect?

A. I think on that day we packed up the camp and took everything over to establish camp—I don't remember whether we got started on the ditch that day or not—no, that is not right.

Q. All right, make it right.

A. We camped on Falls Creek and we started to work on the ditch on that day, on Dollar Creek.

Q. What day was that?

A. The 9th of September.

Q. What were those men worth per day?

Mr. RITCHIE.—We want the prevailing wages.

Q. What were the prevailing wages in that section of the country at that time?

A. Five dollars a day and board, the prevailing wages.

Q. Tell the jury, if you know, what was the cost of their [22—11] board in that section of the country at that time, as near as you can.

(Testimony of Joseph Anderson.)

A. Fully three dollars a day.

Q. Three dollars per day per man?

A. Three dollars per day per man, yes, sir.

Q. Did it actually cost the company that, three dollars a day?

A. I think it did—we pay the cook \$125 per month.

Q. And his board? A. And his board.

Q. Now, what did you do on the tenth of September? A. Worked on the ditch.

Q. What were the horses doing? A. Working.

Q. What doing? A. Plowing, scraping.

Q. How many plows did you have there?

A. One.

Q. What kind of a plow was that?

A. A breaking plow.

Q. Was that land such as could be plowed? Could you do more work with a plow than you could with shovels? A. A good deal.

Q. How many men would it take to handle that plow? A. Two.

Q. What were the other men doing?

A. One was cooking and getting wood—there was no wood there—getting wood and such work, camp work, and for myself I was pulling out sod and doing whatever could be done—I don't mean to say that I worked steadily with a pick and shovel, but I was there. [23—12]

Q. Well, how long did you work there then—how long did the camp stay there?

A. We finished on the 16th day of September.

Q. Did you work every day from the 9th until the

(Testimony of Joseph Anderson.)

16th? A. Every day.

Q. Including the 16th of September?

A. Including the 16th of September.

Q. And it is your opinion that there was \$600 worth of work done on that claim? A. Yes, sir.

Q. By this way of doing it?

A. It is my opinion.

Q. Now, you have been engaged in mining for some years? A. Since 1908.

Q. I will ask you as a miner if that work that you did in that ditch tended to the development of the claim Number 1 above on Dollar Creek. A. It did.

Q. In what way?

A. By bringing water from it on the bench, so that it can be piped by hydraulic methods.

Q. How far would you have to bring this water?

A. Two miles, out of the Dollar Creek ditch.

Q. I will ask who decided to put in this ditch.

A. Mr. Cameron and myself.

Q. You were acting as the agents of the company?

A. I was.

Q. You were both acting as agents of the company?

A. Yes, sir, we were both acting as agents of the company.

Q. And after a consideration of the matter you thought it was [24—13] better to work the claims in this way than in any other way?

A. We considered that was the cheapest method of working that ground.

Q. Now, I will ask you how this Number One

(Testimony of Joseph Anderson.)

above on Dollar Creek can be worked after this ditch is put there.

A. By putting in a penstock at the end of the ditch and connecting it up with pipe and bringing it down into the bottom of the ground and piping out the bottom and then the bench.

Q. You say this claim, Number 1 above on Dollar is right on Dollar Creek?

A. It is on Dollar Creek.

Q. And how far would the creek be from that after it is constructed through?

A. It is about 1500 feet from the rim.

Q. What kind of values are there in this Number 1 above on Dollar Creek—is it a low-grade proposition?

A. Yes, it is a low-grade proposition—the best pay made off of it is about \$22 a day, pick and shovel work.

Q. Isn't that pretty good pay?

A. Yes, if it would run that right along, but it won't average that.

Q. Have you ever measured up the gravel on the ground? A. The gravel mined?

Q. The gravel on the ground which is possible—on the ground Number 1 above, on Dollar?

A. No, I have not.

Q. You don't know about how many cubic yards there are on the ground? [25—14]

A. No, I do not.

Q. Is the pay deep or otherwise?

A. The creek channel was only about an average

(Testimony of Joseph Anderson.)

of about three feet deep before the tailings were put on there and the low bars will average about the same, the creek bars.

Q. Then the construction of this ditch was planned and put in operation by yourself and Mr. Cameron? A. It was.

Q. As the manager and secretary of the company?

A. It was.

Q. When was that decided to be done?

A. In August, 1911.

Q. Was Mr. Cameron on the ground at that time?

A. He was.

Q. Is Mr. Cameron one of the large stockholders of the company?

A. He is a stockholder—he is one of the largest.

Q. Are you a stockholder in the company?

A. I am.

Q. You say you brought some scrapers over there?

A. One scraper.

Q. What did you do with the scraper?

A. Used it for hauling out the dirt, out of the ditch,—making the ditch.

Q. Is it your intention to finish this ditch?

A. It is.

Mr. RITCHIE.—You mean the company's intention?

Judge LYONS.—Yes, sir.

AFTERNOON SESSION.

Q. I want you to tell the jury what these lines represent drawn this way. [26—15]

A. That represents the finished part of the ditch.

(Testimony of Joseph Anderson.)

Mr. RITCHIE.—The way it is now?

A. The way it is now.

Q. What do these dotted lines represent?

A. It represents where the ditch is going.

Q. Is that finished or unfinished?

A. Unfinished.

Q. Where does this ditch run to?

A. It runs into the right-hand fork of Falls Creek, looking down the stream.

Mr. RITCHIE.—We move to strike that as having no bearing on the issues.

Judge LYONS.—I want to show the good faith of the company and their intentions there in building this line of ditches.

By the COURT.—I will overrule the objection, but you cannot go into that to a very great extent.

Q. You say this ditch taps Falls Creek?

A. Yes, sir.

Q. I will ask you if water taken out of Falls Creek into this ditch, how that will benefit the Number 1 above discovery claim?

A. It can be brought around and the intention is to bring it around so it can join the two ditches, water from the two ditches.

Q. That is this ditch here (indicating)?

A. That ditch.

Q. What is this here?

A. That is the way this ditch was intended to go originally, the work done in 1911, but after I started this ditch Mr. Brahenburg put in a new one here and headed me off and I [27—16] consequently had

(Testimony of Joseph Anderson.)

to make this swing here to get up—I abandoned this here.

Q. The water taken out of Falls Creek and the water taken out of Dollar Creek either may be used for hydraulic purposes in extracting the gold from Number 1 above discovery claim?

A. That is the intention.

Q. That can be done?

A. That can be done—on all the claims on Dollar Creek.

Q. Belonging to this company?

A. Yes, it can be extended on down here.

Q. I will ask you if there is plenty of water in Dollar Creek at all times of the year.

A. No, there is not.

Q. Do you know if it is the intention of the company to compete this ditch line according as it is planned here?

A. That is the intention.

Judge LYONS.—That's all.

Cross-examination.

(By Mr. RITCHIE.)

Q. You say there is no large quantity of water in Dollar Creek all the year?

A. No, there is not, not in low water.

Q. What is the period of low water, after the early summer floods?

A. I judge about 200 inches.

Q. I mean what time is the water high?

A. In June, part of July and when the fall rains set in.

Q. Is there high water in August?

A. Sometimes.

(Testimony of Joseph Anderson.)

Q. About how much water is there in August?
[28—17]

A. It varies—in the streams there is lots of water comes down, probably three or four hundred inches.

Q. How much water is there in September?

A. That varies also—the year before last, 1911 and 1912, were wet seasons and it was a stage of high water in both years in September.

Q. Is the water in the creek, after the winter snows are melted in the spring, mostly traceable to rainfall, that is, does the snow melt all summer to any extent so as to add to the volume of the stream?

A. On the upper end of the stream, up at its source.

Q. But the rainfall has a great deal to do with the flow in the middle and latter part of the summer?

A. Yes, sir.

Q. And if there is no rainfall the flow in the stream is very much less than it would be if there was rain? A. Yes.

Q. And in the dry season how low does it ordinarily fall? A. Well, about 200 inches.

Q. Now, Mr. Brahenburg and Mr. Bubb are mining in the gulch that leads into Dollar Creek just about or on the side of Number 1 above discovery?

A. They are mining right on Dollar Creek bench; it is right on the line of Number 1 above, just above the line.

Q. Their property, where they are working now, is just off of Number 1 above discovery, is it not?

A. Yes.

(Testimony of Joseph Anderson.)

Q. Point out on the map where this gulch is that they are working on.

A. The gulch is right in there (indicating) and they are working [29—18] here (indicating).

Q. The gulch is about here? A. Yes, sir.

Q. It is not indicated on that map?

A. It is not indicated on that map, no—it comes right down here.

Q. How long have they been working there on that gulch to your knowledge?

A. To my knowledge they were working there in the spring of 1911.

Q. They located property there in the spring of 1910, did they not?

A. That I can't say—I wasn't there.

Q. When did they divert water from the upper part of Dollar Creek—you spoke of their having a ditch?

A. Well, the second ditch they put in in 1912.

Q. Do you know when they put in the first ditch?

A. I do not.

Q. How much water did that first ditch carry?

A. Why, less than 100 inches, I should judge.

Q. Don't they, as a matter of fact, use all the water in Dollar Creek excepting when the volume is large, in flood seasons?

A. They do now, use the most of it.

Q. So if you completed the ditch, there would be no water left?

A. In low water there wouldn't be but very little left.

(Testimony of Joseph Anderson.)

Q. The periods of low water are a considerable part of the season there, are they not?

A. Well, about half an ordinary season.

Q. How long does the season last there—when does it begin and [30—19] when end, ordinarily?

A. From about the first of June until the 20th of September or the first of October.

Q. And what ends the season, low water?

A. Cold weather.

Q. And then the water supply also is cut off about the same time? A. It gets low.

Q. Now, this work you did on that ditch in 1911—you first told Judge Lyons that you were on the ground on the first, second, 6th and then from the 9th to the 14th continuously—9th, 10th, 11th, 12th, 13th and 14th? A. And 16th, I think.

Q. Yes, and 16th—you were there working continuously eight days? A. It must be.

Q. Your first visits over there were merely preliminary trips to look over the ground?

A. To look over the ground.

Q. What is the description of the country there from where you start your ditch, where you seek to divert the water, down to where the ditch is put in, is it hilly, or rolling or nearly level?

A. This part is nearly level through here (indicating) and this part is on a sloping bank, where we would have to lay pipe to carry the water.

Q. Now, how far from the edge of the stream does that sloping bank begin?

A. From the edge of the stream?

(Testimony of Joseph Anderson.)

Q. Yes, from where the water runs—how far back from it—suppose [31—20] the middle of the table is the stream and over here somewhere is the bank, where the ground rises rapidly. Now, how far is that from the stream?

A. On the upper end it comes right down to the stream and then it is a sloping bank clear down, in fact, all the way down the creek.

Q. And that proposed ditch is to be two miles long? A. Approximately.

Q. About what is the fall?

A. All the way, the average fall, a quarter of an inch to 12 feet.

Q. That would be an inch every 48 feet. Now, is that to be uniform all the way, is the ditch comparatively straight or does it wind a good deal to get grade? A. Comparatively straight.

Q. It just hugs the hillside all the way and doesn't have to swing around very much?

A. The strike of the hills is very nearly even, they are all the way pretty near even; you have to go along the bench until you get on top.

Q. How much is that ditch away from the stream and if it varies state that—when you first pull away from the stream what distance do you get away from it?

A. In a very short distance; you start the ditch from the stream and strike off toward the hill slope here; it is right on top of the hill slope.

Q. You run close to the stream for a ways?

A. You run close to the stream for a ways here

(Testimony of Joseph Anderson.)

and then strike off about this way—at the most it is about a quarter of a mile away from the farthest point. [32—21]

Q. How far is Brahenburg & Bubb's ditch from the stream? A. It is closer.

Q. How close to their ditch?

A. Their lower ditch isn't at any place over a thousand feet.

Q. How close to their ditch, their upper ditch, does your proposed ditch run? A. The intake?

Q. No—it parallels it very nearly, does it not?

A. Yes, sir.

Q. How close does it come to it?

A. In one place on the bank it would be close,—it would be within probably 50 feet of it if it was on a level.

Q. Is it as close as 25 feet in some places?

A. No, I don't think so.

Q. Can you successfully operate that ditch as close as it is to their ditch?

A. I don't see any reason why we can't.

Q. The ground is loose and gravelly?

A. It is gravelly ground, yes.

Q. There is a great deal of seepage in it?

A. No.

Q. Aren't there places where it will break down the banks easily, down toward their ditch?

A. There is one place where it is liable to break through and we would have to either lay pipe or flume, I suppose.

Q. You give the names here of men besides your-

(Testimony of Joseph Anderson.)

self who worked on that ditch and one of them you said, Charley Nawn, merely helped to take up the outfit—where did you get that outfit?

A. At the main camp, at the warehouse. [33—22]

Q. That is on Cache Creek?

A. That is on Cache Creek.

Q. How close was the camp that you occupied while you were doing the work to the ditch itself?

A. Well, it took about twenty minutes.

Q. About a mile and a half—your camp was pitched on Falls Creek? A. Yes, sir.

Q. About a mile and a half from the work?

A. Not that far.

Q. Was it a mile?

A. Less than a mile probably—a mile at the farthest.

Q. How many hours a day did you work?

A. Ten hours, from the time we left camp until we got back—worked nine hours or more.

Q. Now, you had three horses, but you only worked two at a time?

A. We worked two in this way, that there was two working continuously in harness and the other was used to pack feed and supplies from the camp and when a horse got sweatty he was taken out and the other one put in to give him a rest.

Q. You didn't work the plow and scraper at the same time, having only two horses? A. No.

Q. You plowed a while and scraped a while?

A. Yes, sir.

(Testimony of Joseph Anderson.)

Q. It was a railroad scraper?

A. Yes, an ordinary scraper.

Q. Was there much rock in the work you did there?

A. In one place there was a few boulders, none big.

Q. It was dirt and gravel mostly? [34—23]

A. It was dirt and gravel mostly.

Q. Was easily moved? A. Yes.

Q. How many feet did you say you extended that ditch? A. 1600 feet, if I remember right.

Q. Was that of uniform depth?

A. It was of uniform depth except this point here (indicating).

Q. Show us on the map where you started and where you left off in the summer of 1911.

A. Started here and down to here (indicating).

Q. You went to there? A. Yes, sir.

Q. From about there to there? A. Yes.

Q. And you had a continuous ditch, about 1600 feet, where you have indicated on the map?

A. That is right, as near as I can remember.

Q. How deep was that ditch?

A. It was an average of 18 inches on the lower lip.

Q. And how high on the upper lip?

A. There was one place it was about 8 feet, but the most of it was pretty nearly a uniform depth of two feet or so.

Q. How wide was the ditch?

A. Two feet on the bottom.

Q. Isn't it that way all the way through?

(Testimony of Joseph Anderson.)

A. All the way through with the exception of where it dropped off here and wasn't necessary.

Q. Was the ditch completed so you could run water through it most of the way when you left it?
[35—24]

A. There was one or two places where we would have to do a little pick and shovel work to level off the bottom.

Q. Wasn't there a part of that ditch you claimed you had simply run the plow through and it wasn't over six or eight inches deep?

A. Yes, as I told you, here, this part (indicating).

Q. There wasn't very much work done there?

A. It was just plowed down.

Q. The general depth was two or three feet?

A. Yes, sir.

Q. And the ditch was practically complete so if water had been conducted in, it could have run as far as the ditch was dug?

A. No, there was one or two places that would have to be leveled up; there was ground in the bottom that couldn't be taken out with a horse and scraper and it would have to be taken out with the pick and shovel.

Q. Was it a hard bottom in the ditch all the way?

A. Fairly hard. It had to be loosened up.

Q. What did Victor Carlson do?

A. He held the plow and scraper.

Q. And what did George Winter do?

A. He drove the team.

Q. What did Andy Thomas do?

(Testimony of Joseph Anderson.)

A. He done the cooking and camp work.

Q. Then there was only two men working on the ditch proper?

A. Actually on the ditch, besides myself.

Q. You assisted some, but you were principally superintending the job?

A. Yes, but I worked right along—I was there with nothing else to do and worked right along. [36—25]

Q. So there were three of you practically working on the ditch besides the cook? A. There was.

Q. And the prevailing wages of a man up there is you say \$5.00 a day? A. Yes, sir, and board.

Q. And you figure board worth \$3.00 a day?

A. I did then.

Q. How do you figure that?

A. The cost of freighting in there and the wages.

Q. What are provisions worth in that vicinity of Cache Creek, that is, compared with prices down here on the coast—are they worth twice as much?

A. I should judge more than that.

Q. If you add the freight? A. Yes.

Q. Is the freight the equal of the cost price here on the coast?

A. I don't know what the cost price is here.

Q. You are not familiar with the prices here?

A. No, never bought anything here.

Q. What does it cost by the ton to freight from Seldovia up to Cache Creek, ordinary provisions?

A. I don't know what the freight rate is from Seldovia to Sheep Creek, but I should say approxi-

(Testimony of Joseph Anderson.)

mately \$210 or \$215 a ton.

Q. From Seldovia to Sheep Creek?

A. No—to Cache Creek, I mean.

Q. At that time, in 1911, the steamer picked up the freight at Tyonek and ran up the two rivers, or were they shipping [37—26] from Sheep Creek at that time?

A. They were transferring at Port Graham or Seldovia, I don't remember which.

Q. You don't remember whether it went by Tyonek or Sheep Creek?

A. It went by—I can't say; we bought through the A. C. Company, but I don't know how the transfer was made.

Q. Do you know what the freight rate was from Seldovia or Port Graham to the mouth of Lake Creek? To explain that to the jury, provisions are brought on the water up the Inlet, up the Susitna River, up to the Yentna River to the mouth of Lake Creek? A. Yes, sir.

Q. And then you take them, take your freight right up the creek? A. Yes.

Q. What is the freight rate or was the freight rate at that time from Seldovia or Port Graham to the mouth, entirely up to the mouth of Lake Creek, up to where you—what you call McDougall?

A. I think it was \$25 a ton.

Q. And what does it cost to take provisions from McDougall up to Cache Creek and Dollar Creek?

A. It costs about ten cents a pound—that is the figures that the bookkeeper down below gave me,

(Testimony of Joseph Anderson.)

told me, before I ever went in.

Q. So on those figures you figured that the board of the men was worth \$3.00 a day up there—has there ever been any price paid for boarding men up there? A. No.

Q. There is nothing you can go by? [38—27]

A. No.

Q. Now, how do you get at the figure of \$15 a day for the horses? What is a horse worth up there?

A. I want to correct that statement; I figured it out from notes and I find it was \$13 a day.

Q. What do you feed a horse up there from June to September—don't you turn him out on the grass?

A. Not when we are working him, feed him entirely grain and hay.

Q. But the horses do graze a great deal?

A. When they are not working.

Q. And you figure that a horse is worth \$13 a day?

A. I do.

Q. Was there anybody else using horses around there at that time? A. No.

Q. You were working those horses continuously for those eight days, from the 9th to the 16th of September?

A. They were working all the time during working hours, that is excepting the one—there was times when one horse wasn't working.

Q. Ordinarily, you had two horses working and three men besides yourself?

A. There were three horses there for that purpose all the time, and we had to have them.

(Testimony of Joseph Anderson.)

Q. Now, then, what wages were you drawing, what salary? A. I was drawing \$150.

Q. That is \$5 a day?

A. \$5 a day, that is, not during the mining season, but continuously, at any time, whether I am working or not. [39—28]

Q. Now, let us see how you figure this—you figure that there were five men working there, counting the cook? A. No, four.

Q. Four, including the cook?

A. Four including the cook.

Q. And then yourself, you would make five—or was it three men besides yourself?

A. Three men besides myself.

Q. There were just four of you working there?

A. There were four of us working there, outside of the time I put in for Nawn, what he done to benefit the ground, that is, in getting things ready.

Q. But you have in your figures as to the cost of board, the cost of everything else—that is, you have figured the cost of getting everything into the camp—you figure it is worth \$3 a day to board a man on Dollar Creek? A. I do.

Q. And you add to the credit you claim for this work the cost of getting in the outfit—you are counting it twice, then, are you not? A. I am not.

Q. If you figure grub is worth \$3 a day on Dollar Creek, then you are lumping off the total cost of transferring it in there?

A. I am figuring what it cost at the main camp.

Q. It is worth a little more at Dollar Creek?

(Testimony of Joseph Anderson.)

A. It would be, but I never figured it any more.

Q. About working these claims down here (indicating)—you have been up there since 1905?

A. I have. [40—29]

Q. And you and George Eberhardt located all those claims? A. We just located two.

Q. You are very familiar with Dollar Creek all the way down? A. I am.

Q. Just describe to the jury this claim Number 1 above—I mean describe the surface of it. Is it nearly level?

A. The channel here—there was a channel which would average about 60 feet wide at the bottom on this side; all the way down the claim here is a low bar about from four to eight feet high, that is about—it would run from 50 to 150 feet wide and then the bench runs up, a sloping bench.

Q. That claim is 660 feet wide and 1320 feet long?

A. Yes, sir.

Q. You say the river channel, the creek channel, is 60 feet wide? That is not all covered with water?

A. No, the gravel.

Q. And the channel in which the stream runs is 60 feet wide? A. Yes, sir.

Q. And I believe you told Judge Lyons that the gravel or this deposit of tailings you complain of was possibly three feet deep? A. Yes.

Q. Now, have you prospected and worked on the benches to find what the deposit of gravel is, the depth?

A. Not to any great extent. On this side the rim

(Testimony of Joseph Anderson.)

is up about—it is 100 feet above the present creek channel down here.

Q. Then the benches and the bed of the creek which may contain pay is about 200 feet wide?

A. Yes, and it may be more in this bench, on this side—that has never been prospected—it might be somewhere from two to [41—30] three hundred feet. These claims like the discovery and Number 1 below discovery can be considered a box canyon—right in here.

Q. How about one below?

A. The channel is narrow, with some low bars in it.

Q. It is mostly a box canyon, all the way through those two claims? A. No, not this one.

Q. Where does the box canyon end?

A. Right there (indicating).

Q. There is only one claim in the canyon?

A. That is all.

Q. Isn't there pretty steep walls through a good part of that?

A. There are steep walls, but the canyon itself is wide.

Q. Where does this ditch come in, where you have indicated it by the dotted line? Is it to run into the middle of the Boston Association claim?

A. No, sir; that is to indicate it can be run down there without any trouble.

Q. The lower terminus has never been fixed?

A. The lower terminus has never been fixed, no.

Q. Is there any pay in the discovery claim?

A. Yes, sir.

(Testimony of Joseph Anderson.)

Q. Who located that, you or Eberhardt?

A. Eberhardt.

Q. You and George were partners at that time?

A. We were partners at that time.

Q. And one or the other located one below?

A. No, we bought one below.

Q. Who located that? [42—31]

A. Chris Hammerschmidt.

Q. Did you ever do any work on the discovery?

A. Yes, sir.

Q. Whereabouts with reference to the canyon claim?

A. That is the canyon claim—one-third of the way up to the lower rim.

Q. How much did you work on that?

A. There are three good-sized cuts run in it; besides what has been done the last two years.

Q. Has there ever been anything taken out of that to pay for the work on discovery? A. There was.

Q. When? A. Every time it has been worked.

Q. How can you work it?

A. Just pick and shovel, ground sluiced off.

Q. Did you work it a while yourself?

A. I did—Eberhardt and I.

Q. Did you take much money out of it?

A. We took—well, it averaged about, if I remember rightly, about \$12 a day.

Q. In what years?

A. That was in 1906 and 7 and 8 and then it was worked on a lay after that.

Q. What work has been done on the discovery,

(Testimony of Joseph Anderson.)

how has that been worked, the last three or four years—by lays? A. By lays, the last two years.

Q. As a matter of fact, has anybody ever made anything out of that except the Harper Brothers, who one year took \$800 out [43—32] of the bar in a short time—isn't that the only time it has paid?

A. No, it is not; it paid when I worked it.

Q. It has not been worked for the last few years except on small lays, has it?

A. Whether work was done there during the time Cameron was manager, I don't know—I was not there.

Q. Now, your intention was to start way down below there and work up, was it? A. It was.

Q. Did you have a definite policy as to where you would start? A. Yes.

Q. Where?

A. The intention was to start at that time with a flume down in here (indicating), down in discovery and run it through the bottom of the creek, slough—everything in with the pipe, the giants, right into the flume, that is, cut down to bedrock and as a natural grade can be handled very cheaply that way, run everything into the flume, let it come down through and clean the bottom up through and then we can get into the benches without covering up what we consider good ground.

Q. The first work you ever did on that supposed ditch was September, 1911? A. It was, yes.

Q. Did you see Brahenburg and Bubb around there while you were doing the work? A. I did.

(Testimony of Joseph Anderson.)

Q. Did they come over and talk to you about it?

A. They did. [44—33]

Q. What conversation took place between you, if you remember?

A. I think Mr. Braheburg asked me if it was my intention to take their water away from them, and I told them I didn't intend to interfere with any rights they had at that time.

Q. To refresh your memory I will ask you if you did not tell Brahenburg and Bubb that you didn't know whether this would amount to anything, that you simply did it for assessment work, to hold the claims? A. I did not.

Q. You made no such statement at all?

A. I made no such statement at all.

Q. All the work you did for assessment work on those claims, to hold those claims, was this work you did on the ditch? A. It was.

Q. And you figured that as worth \$600?

A. I did.

Q. Who owns the ground where your ditch runs, is it public land or is it located claims?

Judge LYONS.—We object to that; that has nothing to do with this case, that is not at issue.

Objection sustained.

Q. Was there any further conversation than you have indicated took place between you and Brahenburg and Bubb at that time?

A. I think it was at the same time that Brahenburg asked me for a lay on the ground.

Q. Which ground? A. Number 1 above.

(Deposition of Malcolm M. McDougall.)

Cache Creek in the Territory of Alaska, you may now state how many placer claims are owned by said company and how long the plaintiff has [47—36] owned said claims.

Mr. RITCHIE.—We object to that as irrelevant because the question of how many claims is not pertinent to this issue—the question must be as to the six claims that this ditch as originally to be constructed is to benefit.

Objection overruled. Defendant allowed an exception.

A. The company owns in the Yentna Mining District either on Cache Creek or tributaries of that creek quite a number of claims.

Int. No. 7. How much money has been spent by the plaintiff in acquiring said mining claims and developing the same?

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

Objection sustained. Plaintiff allowed an exception.

Int. No. 8. State, if you know, if said claims have been operated by the plaintiff at a profit or a loss.

Mr. RITCHIE.—Same objection.

Objection sustained. Plaintiff allowed an exception.

Int. No. 9. Have you ever been on said property and in what years?

A. Yes, I have been in that district twice, once in 1909 and once in 1910.

Int. No. 10. Do you know of any claims which are

(Deposition of Malcolm M. McDougall.)

owned by the plaintiff on a stream called Dollar Creek, in the vicinity of Cache Creek, and if you do, you may name them?

A. Personally, I was never on any claim on Dollar Creek and what I know of those claims is but evidence of record title and hearsay.

Int. No. 11. State, if you know, whether it is the plan of your company to operate the Dollar Creek claims by means of hydraulic pressure or otherwise.
[48—37]

A. Yes, I know that it is the intention to operate by hydraulic pressure.

Int. No. 12. State, if you know, if your company has planned to put in a ditch or ditches for the purpose of operating the Dollar Creek claims by means of hydraulic power and when, if you know, were such plans first adopted. A. Yes.

Int. No. 13. State, if you know, if the finances of your company enabled you to install a hydraulic plant on Dollar Creek up to this time or otherwise.

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

Judge LYONS.—My intention is to show the good faith of the company.

Objection sustained. Plaintiff allowed an exception.

Int. No. 14. Is the stock in the plaintiff company owned by a large number of stockholders, and, if you know, state approximately the number.

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

(Deposition of Malcolm M. McDougall.)

built by the company from McDougall to the vicinity of these placer claims.

Mr. RITCHIE.—We object to that as irrelevant and immaterial for the reasons stated heretofore.

By the COURT.—The objection will be overruled, for the same reason that I admitted the other question.

Defendant allowed an exception.

A. Yes.

Int. No. 22. State, if you know, what this road cost.

Mr. RITCHIE.—Same objection.

Objection sustained. Plaintiff allowed an exception.

Int. No. 23. Has your company taken horses into this property on Cache Creek from Seattle and the southern coast of Alaska? A. Yes.

Int. No. 24. What is the distance from the coast of Alaska to those mining claims?

A. About one hundred miles.

Mr. RITCHIE.—I move to strike the answer as not having any bearing on the issues in this action.

Motion denied. Defendant allowed an exception.

Q. Do you know the cost of hay, etc.—I will not read the remaining questions, as they come within your Honor's ruling. [51—40]

Cross-interrogatories.

Q. No. 1. What is the length of roads constructed by the Cache Creek Mining Company in the Cache Creek district, and where are their termini?

Answer to Cross-interrogatory No. 1.

They commenced at McDougall and terminated up

(Deposition of Malcolm M. McDougall.)

Cache Creek at a point near or at the intersection of Nugget Creek, making about sixty-five miles.

Q. No. 2. Were those roads built by the company alone for its own purposes? If not, who else was interested and what contributions, if any, did other persons make toward their construction?

Answer to Cross-interrogatory No. 2.

They were built by the company alone for its own purposes and I knew of no one else contributing thereto or interested therein, except the bridge constructed by the Government heretofore mentioned.

[52—41]

Judge LYONS.—I will now read the deposition of R. J. Cameron.

[**Deposition of R. J. Cameron, for Plaintiff.**]

The said R. J. CAMERON being first duly sworn to tell the truth, the whole truth and nothing but the truth, in answer to the interrogatories testified as follows:

Int. No. 1. State your name, age, residence and occupation.

A. R. J. Cameron; fifty years; Seattle, Washington; my active life has been that of a lumberman; recent years I have not been actively engaged in business.

Int. No. 2. If you hold an office in the plaintiff corporation, please state what office it is.

A. Yes, I am secretary and treasurer of the plaintiff company.

Int. No. 3. Do you know the defendant, Henry Brahenburg, and if you do, state how long you have

(Deposition of R. J. Cameron.)

known him. **A. Yes, only casually.**

Int. No. 4. State if you know where the property of the plaintiff company is situated and what does it consist of.

A. Yes, it is claim Number 1 above on Dollar Creek, a tributary of Cache Creek in the Yentna Mining District of Alaska; it consists of ordinary placer claims that have been regularly located, and described in the complaint on file.

Int. No. 5. If you state that the property of this company is situated in the vicinity of Cache Creek in the Territory of Alaska, then state if you ever saw said property and in what years.

A. Yes, in the years 1910 and 1911.

Int. No. 6. State, if you know, of a certain stream named Dollar Creek in the vicinity of Cache Creek, and if you do, you may state if the plaintiff company owns any mining claims on Dollar Creek. [53—42]

A. Yes.

Int. No. 7. State, if you know, of a certain mining claim on Dollar Creek known as Number One above, and if you know, state whether or not Dollar Creek flows through this claim. A. Yes.

Int. No. 8. State, if you know, who is the owner of the next claim and all the claims on Dollar Creek above Number One above on Dollar.

A. I only know the claim immediately above Claim Number One above, which is reputed to be owned by Brahenburg and Bub.

Int. No. 9. Have you ever been the manager of the plaintiff company, and if so, in what year or years?

(Deposition of R. J. Cameron.)

A. Yes, in the year 1911.

Int. No. 10. State if you were on the property of the company in the year 1911, and if you were, state during what months.

A. Yes, during the months of June, July and August.

Int. No. 11. Do you know Mr. Joseph Anderson and if you state that you do, then state if you know what position he now holds with reference to the plaintiff company and how long has he held such position.

A. Yes, he now holds the position of superintendent and manager in Alaska and he has held that position since 1911.

Int. No. 12. State, if you know, how many placer claims the plaintiff company owns on Dollar Creek.

A. About nineteen. (On the basis that twenty acres constitutes a claim—some of ours have been staked in groups.)

Int. No. 13. State if you have ever talked over with Mr. Anderson on the question of the most economic way of mining the company's claims on Dollar Creek.

Mr. RITCHIE.—We object to conversations between Mr. Cameron and Mr. Anderson. [54—43]

Objection sustained as incompetent and immaterial. Plaintiff allowed an exception.

Int. No. 14. If yourself and Mr. Anderson talked this matter over and you decided on a certain way for mining said claims, you will please state if that way was by means of hydraulic pressure.

(Deposition of R. J. Cameron.)

A. Yes, it was.

Int. No. 15. What is the distance, if you know, from the claim known as Number One above on Dollar Creek to the source of Dollar Creek?

A. I do not know.

Int. No. 16. While you were the manager of said plaintiff company, if you testify that you have been its manager, then state what the result of your talk with Mr. Anderson was with reference to building a ditch from the head of Dollar Creek, so that the same could be used for generating hydraulic power for the purpose of washing gravel on Number One above on Dollar Creek and other claims which the plaintiff company owns on the same stream.

A. We made an investigation and talked the matter over at great length and at last decided that it was feasible, and I instructed him to dig a ditch and take the water from Dollar Creek high enough above to wash the gravel of all our claims by hydraulic pressure.

Int. No. 17. If you determined to build said ditch while acting as the manager of said company, please state the length of the same approximately, together with its cost and what amount of money, if you know, had been expended by the company in building the same prior to the first day of August, 1912.
[55—44]

A. I left those details to Anderson and could not of my own knowledge give a definite answer.

Int. No. 18. State, if you know, when the work was first commenced on this ditch.

(Deposition of R. J. Cameron.)

A. I think in 1911, under Anderson.

Int. No. 19. Do you know the firm of Brahenburg & Bub? A. Only casually.

Int. No. 20. How long have you known Mr. Brahenburg and Mr. Bub?

A. I met them first in 1911.

Int. No. 21. Do you know whether or not they or either of them was the owner of any claims on Dollar Creek and how many?

A. They were the reputed owners of the adjoining claim immediately above Number One claim above on Cache Creek.

Int. No. 22. If you state that they are the owners of mining claims on Dollar Creek, then you may state if you ever saw them mining said claims and whether said mining operations were carried on by means of hydraulic power or otherwise.

A. Yes, they were operating some by means of hydraulic power.

Int. No. 23. If you state that the mining operations of Brahenburg and Bub were carried on by means of hydraulic power, then you may state where they are getting water for the use of the same.

A. They got the water out of Dollar Creek by the use of a ditch.

Int. No. 24. If you state that the water is carried in a ditch then state what is the length of said ditch and where is its source.

Mr. RITCHIE.—I don't think this is pertinent. It was stipulated that these depositions could be used

(Deposition of R. J. Cameron.)

in both cases. We object to it as irrelevant. [56—45]

Objection sustained. Plaintiff allowed an exception.

Int. No. 25. State, if you know, how long they have been using said ditch and if they were using the same in August, 1911.

Mr. RITCHIE.—We object to that as irrelevant—it is pertinent to the other case but not to this.

Objection sustained. Plaintiff allowed an exception.

Int. No. 26. If you testify that a ditch has been built by the firm of Brahenburg and Bub and that one is being built by the plaintiff in this action, then state how far such ditches are from the main stream of Dollar Creek.

A. I could not say definitely; they were on the benches of Dollar Creek.

Int. No. 27. State if such ditches run nearly parallel to each other or otherwise.

A. Yes, they ran parallel or at least in the same general direction.

Int. No. 28. State, if you know, what becomes of the washed gravel in the flumes of Brahenburg and Bub, if you have seen such flumes and know of the hydraulic operations conducted by said firm.

Mr. RITCHIE.—We object to that as irrelevant—that is for the other case.

Objection sustained. Plaintiff allowed an exception.

Judge LYONS.—That is true of the remaining

(Deposition of R. J. Cameron.)

questions; they would be for the other case too and I will not read them.

Cross-interrogatories.

Q. No. 1. When you decided to start digging a ditch from Dollar Creek to carry water for hydraulic mining, on what claims did you expect to use the water? In what year and month [57—46] did you make this plan for the company, and did you not then know that Brahenburg and Bub were already using by prior right all the water in Dollar Creek except in flood seasons?

Answer to Cross-interrogatory No. 1.

On Claim Number One above and on all our adjoining claims below Claim Number One above to which the same might be appropriated as stated in the direct interrogatories. That was about in the year 1911 and I do know that Brahenburg and Bub were not already using all of the water in Dollar Creek for their own purposes.

Q. No. 2. What kind of a plant were Brahenburg and Bub using when you were on their property? Describe it and its capacity.

Answer to Cross-interrogatory No. 2.

As I remember, it was a pressure hose with two small nozzles.

Q. No. 3.—

Mr. RITCHIE.—That is for the other case.

Judge LYONS.—Yes, sir.

Plaintiff rests. [58—47]

(Testimony of Henry Brahenburg.)

had to start digging a ditch there and taking our water.

Q. Relate the conversation. Just state what was said, not your reasons for asking but just what you said and what [60—49] Anderson said. Was there anybody present when you first went up besides you two?

A. No, I and Bub, my partner, the first time; the second time there was several parties present.

Q. In this first conversation state what each of you said.

A. I asked him what right he had to dig his ditch and where he was going to get his water—I said it looked like he was trying to put our property in litigation by digging a ditch and taking water, when we already had two ditches, one completed and one-half completed and we didn't have half enough water for ourselves and there was no way for me to stop them without going to court.

Q. What did Anderson say, if anything?

A. Well, he said he was just doing it, doing assessment work; he said he thought they might use it some time and I asked him where he was going to get his water and he said he didn't know.

Q. At that time were you and Bub using all of the water in Dollar Creek?

A. We were using it except at high water; yes.

Judge LYONS.—This line of questions seems to me to be incompetent and I object to them.

Objection sustained. Defendant allowed an exception.

(Testimony of Henry Brahenburg.)

Q. Now, did you see that work from time to time when it was being done?

A. I would see it every day, yes. We were above timber line and everything was in plain sight.

Q. How high is that country around there, about what is the elevation?

A. Three thousand or something like that, I guess; close to [61—50] three thousand.

Q. Did you see the work when they finished it?

A. Yes.

Q. How many men did you see working there? You say you were there every day, in 1911?

A. There was two besides Anderson himself on the work.

Q. Who were those men?

A. George Winter and Victor Carlson.

Q. Did you know Andy Thomas? A. Yes.

Q. What did Andy Thomas do, if you saw him do anything?

A. I didn't happen to see him; they were a mile or a mile and a half on Falls Creek; they had their camp over there.

Q. You saw the work when it was finished. Describe what that work was like when they quit and pulled off their men and horses.

A. As near as I can describe it, it was just—

Q. Go to the plat and indicate to the jury the nature of the work and the length of it as you remember it.

A. Well, there was about fourteen or fifteen hundred feet here; as near as I can describe it, it was

(Testimony of Henry Brahenburg.)

just plowed out, no part of it looked like a ditch, no part of it would carry water, and it would cost more to complete it than they had already done.

Q. How deep was that ditch from place to place? If it was of varying depths, describe it as you go along.

A. Half of it ain't plowed out and the other half I don't think would average more than six or ten inches; there is places where it is two feet deep, that is holes.

Q. What would you say was the average depth of the digging in [62—51] that ditch?

A. Six or eight or ten inches.

Q. And the average width?

A. Well, two feet; something like that, I guess.

Q. Now, Mr. Anderson spoke of the upper lip being a much deeper cut than the lower one; now, how deep were any of the excavations on the upper side of that ditch?

A. One or two places were three or four feet, three or four or five feet, something like that, a steep point; the upper end of this is all steep bank, there is no lip to it, everything is rolled down, and our ditch is just below here (indicating), about an elevation of 25 feet between the two ditches; our ditch runs clean up into the creek, it is about two thousand feet up to the head of that ditch; that is not completed at all, not even a survey of it.

Q. What kind of a bottom did that ditch have?

A. They didn't go through the loam. There is about two or three feet of loam and there would be

(Testimony of Henry Brahenburg.)

gravel under that and some glacier clay.

Q. Did he have a solid bottom to any extent?

A. No.

Q. What was on the bottom?

A. Loam and one or two places they struck a little fine gravel.

Q. No clay?

A. No, I don't believe there was.

Q. State what work was done there besides the plowing and scraping and how much scraping was done, if you know.

A. There was very little; I never seen over two or three hours scraping in all that time.

Q. How much time did you spend around the work? [63—52] A. How is that?

Q. How much time did you spend around the work while they were doing it?

A. I never spent much time right at the work, only a few minutes at a time, but I was within half a mile or quarter of a mile of the work all the time and could see them all through the day.

Q. And you say you visited it every day, came up to the work every day?

A. Yes, that was to go up on our ditches, taking care of our ditches.

Q. Have you any photographs of that ditch as it was in 1911? A. Yes, sir. I gave them to you.

Q. Pick out of there any photographs which show the ditch as it was when they finished the work in 1911, that will show any part of it.

A. This is one at the lower end of it when they

(Testimony of Henry Brahenburg.)

finished, when they left off. Here is one that shows the biggest cut on it.

Q. How much of the length of it does this show?

A. About three or four hundred feet.

Mr. RITCHIE.—We will offer these as exhibits.

They are admitted and marked Defendant's Exhibits One, Two and Three.

Q. How many horses did they have working there?

A. I never see but two work at the same time. There were three horses there but I never see but two work.

Q. They had two on the plow and two on the scraper? A. Turn about; yes.

Q. They couldn't work a plow and scraper at the same time? [64—53] A. Yes, they could.

Q. Do you know what the work of a horse is worth by the day up there? Has there been any great number of horses used up there, so you can fix the value of them?

A. Yes, there has been horses up there; they figure them the same as a man's wages and add on the feed; there were horses running up there, there was a pack train running there all summer and you could get a horse for ten dollars a day through the summer season.

Q. That would cover his work and his keep too?

A. Yes, sir.

Q. How do they feed horses there in the summer time?

A. They feed them with grain when they are working.

(Testimony of Henry Brahenburg.)

Q. And turn them out to graze when they are not working? A. Yes.

Q. Were you over at the Falls Creek camp when they were working up there?

A. Not while they were working there, no, not while they had their camp there—I was not there.

Q. These photographs have been offered in evidence. Now, take this one—take one at a time, and explain to the jury just what part of the ditch they show and tell them what length; take them in their order, 1, 2 and 3—take 1 first and tell the jury what part of the ditch that shows and to what length.

A. That is about 200 feet at the upper end, where they left off.

Q. That is the upper end of the ditch, about where they start?

A. Yes. About 2,000 feet from the head here.

Q. This shows about 200 feet in linear extent of the ditch at the upper end? [65—54] A. Yes.

Q. And what does the second one show?

A. That shows about 300 feet of the lower end.

Q. And what does this show—3?

A. That shows something like two or three hundred feet about the middle.

Mr. RITCHIE.—That's all.

Cross-examination.

(By Judge LYONS.)

Q. Did you ever hire any horses?

A. Yes, we have.

Q. From whom?

A. We hired some horses from the Cache Creek

(Testimony of Henry Brahenburg.)

Mining Co. at one time to do our freighting.

Q. What did you pay for those horses?

A. We gave them \$100 a day for the outfit—they had seven horses and four men.

Q. Six or seven horses?

A. Seven horses for four days—I think we had them for 8½ days—there was, I think, four days we had seven horses and the rest of the time we had six horses.

Q. Why didn't you have the seven for all the time?

A. One of the horses got sick, I think, something like that.

Q. You say that you were up around this ditch that was dug by the company every day during the month of September? A. Yes, every day.

Q. What were you doing there?

A. Taking care of our ditch.

Q. Taking care of your ditch?

A. We were using our ditch and we had to go up and look after [66—55] it every day and high water we have to have a man on it all the time. This was the fall of the year and we were closing down and we looked after it ourselves; one of us would be up on the ditch two or three times a day and then one of our ditches was not complete and we were working on that off and on at times.

Q. Was Mr. Anderson working there?

A. He was always around—no, he was not working there.

Q. Never works at all?

A. I never see him work.

(Testimony of Henry Brahenburg.)

Q. You stayed there all day, did you, on their property?

A. No—I was generally around; we were operating too.

Q. This was the month of September?

A. Some time in September, yes—I don't remember exactly the dates.

Q. You were simply around at that time watching the operations of the other company?

A. No, not particularly.

Q. You say you were there every day?

A. We were there every day where we could see them—we could see them right from our works without going up there; we didn't have to go up where they were working.

Q. Now, if there was more work done on this ditch of the plaintiff company—can't it be made into a good ditch by more work?

A. Yes—a fellow could start a new one alongside of it and make it a great deal cheaper than the one already started.

Q. Why? A. Well, several reasons. [67—56]

Q. If you know that that is true, answer the question. Why?

A. Well, they plowed out a lot of ground there and they have—well, if they could run water uphill they probably could dig the ditch all right; something like that.

Q. That is the best answer you can give to my question? I asked you why you stated to this jury that another ditch could be made cheaper alongside

(Testimony of Henry Brahenburg.)

of this one than this one could be finished up.

A. I have dug two ditches right alongside of it there and I didn't use a horse; I dug it by hand and with the conditions of that ground it could be dug cheaper by hand, a ditch can, than it can with horses.

Q. Tell the jury why.

A. Because it is on a sidehill and all the material they plow out of the ditch rolls down the hill; if you dig it by hand you pile that up—you build the ditch up.

Q. Suppose you take the material out of that ditch by hand, where would you throw it?

A. You place it, you build a levee up.

Q. Can't you build a levee up with a plow, partially at least?

A. You are on a steep sidehill and everything rolls downhill.

Q. Can't you go along with your shovels and fix that up afterwards?

A. Yes, you can dig it by hand, yes—then you are digging.

Q. Why did they bring that scraper and plow over there?

A. Because they had a lot of horses there and that was the cheapest way for them to do the assessment work—that was the only way that I could figure it out.

Q. Did you have horses when you dug your ditch? A. I had a horse; yes. [68—57]

Q. Who owned it? A. Me and my partner.

Q. Who were these parties that owned these

(Testimony of Henry Brahenburg.)

horses that did that freighting over in that country you are talking about? A. The horses we hired?

Q. Yes. A. The Cache Creek Mining Company.

Q. You testified to some other horses being used in that country—who owned those horses?

A. We owned one.

Q. How many more horses were there in the country for hire?

A. There were horses in that country before the Cache Creek Mining Co. came up there, right in the Cache Creek country.

Q. Who owned the horses at the time you say they were there? A. A man named Bill Hughes.

Q. How many horses did Bill Hughes own?

A. I forget; he had six or eight, something like that; I don't know the number; he packed freight in there, I think, in 1905 or 1906.

Q. That was before the Cache Creek Mining Co. was in the country at all? A. Yes.

Q. What other horses were in that country since the Cache Creek Mining Co. people came in?

A. There was quite a few horses in there—we had one horse at that time.

Q. You don't know whether anybody that was freighting in there for hire at all since the Cache Creek Mining Co. came in there?

A. Yes, there was a man named Sam Graham had a couple of [69—58] horses and was freighting in there; I don't know that he came clear to Cache Creek but there was two or three outfits besides the Cache Creek Mining Co. outfit that freighted into

(Testimony of Henry Brahenburg.)

the Cache Creek country.

Q. Who were they?

A. Bill Hughes, Sam Graham and myself.

Q. Hughes wasn't there before the Cache Creek Mining Co. came there? A. No, I believe not.

Q. When did you take these photographs?

A. They were taken late this last fall.

Q. Who took them? A. The Harper Brothers.

Q. Did you ever hire any horses in there for ten dollars a day?

A. Those are the only horses I ever hired, what we hired from the Cache Creek Mining Co., and I never figured out what they really did come to a day; it was \$100 for seven horses for four days and six horses for four days and a half, with a crew of four men, harness, feed and everything thrown in—it was \$100 for the outfit.

Q. And one of those horses was not working?

A. There was seven horses worked four days and six horses four days and a half.

Q. What were the seven horses doing?

A. Hauling freight.

Q. What were they hauling freight on?

A. Double-enders.

Q. How many sleds did you have?

A. Well, they had seven sleds,—some had trailers and some were [70—59] single sleds, I don't know exactly—each horse had a sled.

Q. Do you mean to tell this jury that you had seven sleds?

(Testimony of Henry Brahenburg.)

A. Each horse had a sled; there were seven sleds, yes.

Q. Now, you have built a ditch over there along the same stream, have you not, and taken water out of Dollar Creek?

A. Yes, we built two ditches and several small ones; we are using all the water of Dollar Creek and have started another ditch out of Falls Creek and haven't half enough water the way it is.

Q. You haven't half enough water the way it is?

A. No; our ditches are fixed to carry all the water in Dollar Creek except in extreme high water, probably two or three days in the season; outside of that we are using all the water and have been using it for the last two years, that is, all of it; we have been using it for the last four years.

Q. When did you locate your claims in there?

A. The summer of 1910 what we located and the other claims we bought.

Q. Did you see George Winters there in September, 1911?

A. He was working for the Cache Creek Mining Co. at that time and afterwards went to work for us.

Q. He was working for the Cache Creek Mining Co.?

A. At that time, yes, 1911.

Q. What was he doing?

A. He was driving the team.

Q. What was the team doing?

A. Plowing the furrows in that ditch.

Q. Do you know Victor Carlson?

A. Yes, sir.

Q. What was he doing? [71—60]

(Testimony of Henry Brahenburg.)

A. I believe he was holding the scraper the best part of the time, and holding the plow when they were plowing.

Q. They were not sitting around—you didn't see any of them sitting around and not doing anything?

A. Well, no, hardly—I couldn't see that they were sitting around.

Q. They were working as hard as you were, watching them? A. They were putting in time.

Q. What were you doing? Watching the operations of the company?

A. Watching the operations of the company and putting in time also.

Q. Do you know Andy Thomas? A. Yes, sir.

Q. Was he working there at that time?

A. I believe he was doing their cooking over on Falls Creek.

Judge LYONS.—That will be all.

(By Mr. RITCHIE.)

Q. You stated a while ago in answer to Judge Lyons' question that your own work compelled you to go up along the ditch every day?

A. Yes, it does, two or three times a day and sometimes it keeps a man there all the time.

Q. And in going along that ditch you came how close to their work?

A. Their ditch is about 25 feet higher up than our ditch—there are places that it ain't 30 feet of a climb to their ditch.

Q. So that in going up and down your ditch you pass them every day? A. Yes, sir. [72—61]

(Testimony of Henry Brahenburg.)

Q. Now, this time that you hired this outfit from the Cache Creek Mining Co.—when was that?

A. That was in the fall of 1911, I believe.

Q. About the same time? A. Yes, sir.

Q. What month—after the snow was on?

A. December or January.

Q. As you were using sleds it was necessarily after the snow came? A. Yes, I think it was January.

Q. You hired seven horses from them and seven sleds and harness and four men and the feed for the horses—they furnished the feed for the horses?

A. Yes, sir, for the whole outfit.

Q. They furnished everything?

A. They furnished everything.

Q. Wages and board for the men and everything?

A. Yes, sir.

Q. And you paid them \$100 a day? A. Yes, sir.

Q. That is all? A. That is all.

Q. Are horses worth more in summer or winter in that country? A. Just about the same, I guess.

Q. They have to be fed wholly on hay and grain in winter? A. Yes, sir.

Q. Whether they are working or not?

A. Whether they are working or not they have got to be fed all through the winter; if they are working they have got to be fed more than if they were not working. [73—62]

Q. Is there good grass in summer that they can be turned out on if they are not working?

A. Yes, sir.

(Testimony of Henry Brahenburg.)

(By Judge LYONS.)

Q. Do you mean to say that horses can work on grass up in this country? A. No, sir.

Q. You don't mean to say that? A. No, sir.

Q. Did you ever work for the Cache Creek Mining Co.? A. Yes, sir.

Q. When?

A. The spring of 1910 the first time and the spring of 1911 I worked for them.

Q. How long did you work for them altogether?

A. Five or six months, something like that, I guess, all told.

Q. When did you quit working for them?

A. The first time I quit was along in the middle of the summer of 1910, the first day of July, I believe it was; the other time I quit, I think it was getting along the first of June, in the spring.

Q. Of what year? A. 1911, I believe.

Q. Then you were not working on your claims all the time?

A. My partner was, yes, and he had men working in my place.

(By Mr. RITCHIE.)

Q. What were the going wages for miners and other men doing such work as that, working on this ditch, at the time that was done? [74—63]

A. They were paying \$100 a month then, that is, the Cache Creek Mining Company was.

Q. One hundred dollars a month and board?

A. Yes, sir.

(Testimony of Henry Brahenburg.)

Q. How many days did they work a week—six or seven?

A. Working thirty days in the month, I guess—put in the whole month, I think.

(By Judge LYONS.)

Q. What is board worth up there?

A. We always figure about \$2.00 a day.

Q. How do you figure that?

A. Well, the cost of grub, the cost of freighting, getting it in there and that is what the general camp figures it at, at \$7 a day to the man; that is, \$5 a day and allow him \$2 a day for board; that is the general rule of the camp. We never figured it out closely, but I think that is what it cost us, what little operations we done.

Witness excused. [75—64]

[Testimony of Louis Bub, for Defendant.]

LOUIS BUB, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. Louis Bub.

Q. What business relations, if any, exist between yourself and the defendant here?

A. We are partners.

Q. You are partners on some property on Dollar Creek in the Yentna country? A. Yes, sir.

Q. How long have you lived in that country?

A. Almost nine years.

Q. What have you been engaged in up there?

(Testimony of Louis Bub.)

A. Mining.

Q. What year did you go over there?

A. The winter of 1905.

Q. And have been prospecting and mining there ever since? A. Yes, sir.

Q. When did you become associated with Brahenburg? A. I think it was about 1908.

Q. You know Mr. Anderson? A. Yes.

Q. Were you in the vicinity in September, 1911, when Anderson and some men did some ditch work along Dollar Creek? A. I was.

Q. Did you see that work? A. Yes, sir.

Q. How often?

A. I would go by it every day. [76—65]

Q. Why did you go by it every day?

A. We had a ditch below there and we used to go up there to see if our ditch was all right, and we were digging another ditch above at the time and the trail to get to it was right by where the company was working.

Q. How many men were working on that ditch, digging? A. Two, I see.

Q. Who were they?

A. George Winters and Victor Carlson.

Q. Was Anderson there? A. Yes, sir.

Q. Was he working with the men?

A. I never see him working. I have seen him surveying, that is, he had a tripod and was surveying the ditch.

Q. Superintending the work? A. Yes, sir.

Q. How many horses did they have?

(Testimony of Louis Bub.)

A. Three horses were there.

Q. How many worked at a time?

A. Two,—that is all I ever see.

Q. Did you have any talk with Anderson or hear any between him and Brahenburg in regard to this?

A. Yes, sir.

Q. State briefly what was said.

A. The first time they started the ditch my partner and I went up and asked him what he was doing; he said he figured on digging a ditch and we told him, he surely knows there isn't water enough in the creek for our purpose and he says he knows, but he says he got the orders to dig this ditch for the assessment work but he didn't know whether he would [77—66] ever use it or not.

Q. Did you see that ditch after it was completed, that is, the work they did on the ditch?

A. I didn't see no ditch.

Q. You saw the work after it was finished, after they pulled away from there? A. Yes.

Q. Just get up to the plat there and describe to the jury beginning at the upper end, the nature of the work, as you would describe the surface of the ground of any country that you wanted to describe.

A. This is the ditch they started in 1911—it is about 1,600 feet.

Q. What is that ditch like at the upper end?

A. Well, at the upper end there was one place for about 30 feet it was about two feet deep, probably four feet wide; and there was a stretch on the side of that that was ten inches deep; that ditch for 400

(Testimony of Louis Bub.)

feet at the upper end was running uphill. When I saw that I surveyed it with a level, surveyed it myself and know it was surveyed uphill and would have to be lowered two feet before the water would run.

Q. The question is how much digging they actually did—what was the average depth and width of the digging they did there?

A. From one end to the other probably 8 inches deep and two feet wide.

Q. What was the deepest part?

A. About two feet deep.

Q. Where was that? A. On the upper end.

Q. How much of it was 2 feet deep? [78—67]

A. About 30 feet, probably 40.

Q. How did they leave the bottom of those diggings? Was it down to clay or anything, was it a hard bottom, so it would carry water?

A. In one place in this hole where they got two feet they struck gravel and the rest of it it was all loam.

Q. What was the appearance of the ditch at the place where it was shallowest? A. Why, loam.

Q. The bottom of it was loam you say?

A. Yes, sir.

Q. And what was the depth and width of the shallowest place?

A. Probably twenty inches, two feet wide, six inches deep—just the depth of what you can go along and plow out with one furrow of the plow.

Q. Did they scrape the entire length of it?

(Testimony of Louis Bub.)

A. No, sir.

Q. How much of it did they not scrape?

A. At the upper end there was a stretch, we will say probably 300 feet that there was just simply furrows plowed and they are laying there yet.

Q. No shoveling was ever done on it?

A. No, sir. And on the lower end was a stretch for 500 feet that there was just two furrows plowed—one furrow would fall out and the next furrow would fall on that, and that was all that was done.

Q. What were the wages of men up there at that time?

A. In September, 1911, the going wages were \$5 a day and board.

Q. What were horses worth about that time, to work by the day— [79—68] do you know about what horses were worth at that time up there, for working purposes? A. Yes.

Q. How much per day?

A. Ten dollars—any places I have ever been a horse was the same as a man's wages and his feed.

Mr. RITCHIE.—That's all.

Cross-examination.

(By Judge LYONS.)

Q. Do you know anybody up there who was renting or hiring horses for \$10 a day? A. Yes, sir.

Q. Who? A. George Labelle.

Q. How many horses did he have?

A. He had two.

Q. What was he doing?

A. Packing; he ran a pack train up there, packing

(Testimony of Louis Bub.)

the mail up or anything a man wanted up there and any small articles anybody wanted.

Q. Do you know anybody he rented horses to for ten dollars a day? A. Yes, sir.

Q. Who? A. Mr. Murray.

Q. What was Mr. Murray doing with the horses?

A. He rode them in from McDougall to Cache Creek.

Q. To Cache Creek? A. Yes, sir.

Q. For how long a time? [80—69]

A. It took him three days and a half or four days, I wouldn't be sure.

Q. He was simply taking the horses in for the other man? Where was he bringing the horses from? You said this other party was using these horses for carrying the mails and carried little articles in with him? A. Yes.

Q. How long did he carry the mail?

A. He carried the mail all summer.

Q. Then he wasn't hiring the horses out every day?

A. Why, he could easily pack the horse, pack the mail, rather, on one horse.

Q. Was he renting the horses out every day?

A. No, there wasn't enough business up there to rent them out every day but any time anybody wanted them he could get them for ten dollars a day.

Q. Who owned this horse? A. We did.

Q. You and Mr. Brahenburg owned the horse?

A. I and my partner.

Q. Now, this ditch that you describe that was put in there by the Cache Creek Mining Co., the plain-

(Testimony of Louis Bub.)

tiff—is it not a fact that that ditch could be finished up and made a good serviceable ditch?

A. Yes, by a lot of work.

Q. You had to do a lot of work on your ditch, didn't you?

A. Yes, but we completed 3,000 feet of ditch for \$800, whereas they have just got 1,400 feet started for \$600.

Q. I thought you stated a while ago that there was about 1,600 feet there? [81—70]

A. 14 or 1600 feet; I don't know exactly; between that.

Q. You saw Anderson up there surveying, you testified? A. Yes.

Q. With a tripod and level?

A. That is what he called surveying—he said he surveyed it.

Q. He was using a tripod and level? A. Yes.

Q. Isn't that work? A. It might be.

Q. What were you doing up there? A. Mining.

Q. Where? A. On Dollar Creek.

Q. How far is your claim from where this work of the company is going on, where you are mining?

A. I should say about two claims and a half lengths.

Q. About 4,500 feet, is that about it?

A. Yes, something like that.

Q. You go up there every day? A. Yes, sir.

Q. You think they were working over there for fun, those people.

(Testimony of Louis Bub.)

Mr. RITCHIE.—We object to that as calling for a conclusion.

Objection sustained.

Q. How large a plow was this the plaintiff was using there? A. I couldn't say.

Q. You didn't see the plow? A. Yes, I did.

Q. Do you know how large it was? A. No.

Q. What kind of a plow was it? [82—71]

A. Breaking plow, I think; I wouldn't be sure—I didn't pay any particular attention to it.

Q. Did you see the scraper? A. Yes, sir.

Q. You say Anderson wasn't doing anything at all? A. He wasn't when I see him.

Q. You didn't pay much attention to the plow and scraper but took particular pains to see that Anderson wasn't working at all—wasn't when you saw him?

A. The man was standing there; you can't help seeing he is not working.

Q. What was he doing—standing up?

A. I saw him several times—he was sitting down on the plow.

Q. Was the plow idle? A. Yes, sir.

Q. I thought you said they were working the plow?

A. They would use the scraper once in a while.

Q. It is a fact that if this ditch is finished up it can be made a serviceable ditch, according to your testimony. A. There is no water to go through it.

Q. The ditch would be all right if there was water, wouldn't it? A. It is not now.

(Testimony of Louis Bub.)

Q. I say if there was—suppose there is water, if they finished it, it would be all right? A. Yes.

(By the COURT.)

Q. Suppose they take your water.

A. Then we will have to quit mining.

Q. Suppose they claim they are the owners of that water and [83—72] intend to take it and you are going to have a lawsuit about it afterwards—do you think it would be serviceable, could they use it if they took your water—could they use it to take the water out of Dollar Creek that you are now using?

A. Yes, sir; it is above our ditches; if they complete that ditch it will take the water out above our two ditches.

Q. How do you know they do not intend to do that?

A. I don't know—they surely have not made very strong efforts to complete it.

(By Judge LYONS.)

Q. They have another ditch tapping Falls Creek, haven't they, the same company?

A. Why I think they have got two, that is, started.

Q. They have started two ditches, have they?

A. Yes, they started one out of Falls Creek in 1911 and they started another one this fall.

Q. You have two ditches, haven't you?

A. Yes, sir, they are completed, water through them.

Q. It took you some time to complete them, did it not? A. Not very long.

Q. You didn't have them completed in a day?

A. No.

(Testimony of Louis Bub.)

Q. Nor in a week? A. No, sir.

Q. How long did it take you to complete them?

A. My partner and I dug one, the lower ditch, and completed it in fifteen or sixteen days, I think it was, and had the water running through it.

Q. Can the water be taken out of Cache Creek or Falls Creek to wash this ground or gravel down on Number 1 above on [84—73] Dollar and these other Dollar claims?

Mr. RITCHIE.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled.

Q. They can run it part way through this ditch, after the ditch is completed?

A. Yes, sir, it can go across but if they take the water out of Falls Creek, they take the water away from people mining on Falls Creek.

(By Mr. RITCHIE.)

Q. You stated a while ago that you and Brahenburg built 3,000 feet of ditch for \$800?

A. No, sir, we had men hired and built it for that purpose.

Q. You stated the cost of building 3,000 feet of ditch was \$800? A. Yes, sir.

Q. What is the depth and width of that ditch?

A. It is two feet deep and four feet wide at the bottom, on the average.

Q. A complete ditch that carries water?

A. Yes, sir.

Q. With a good bottom? A. Yes, sir.

Q. Does the work that has been done in two years

(Testimony of Louis Bub.)

on the Cache Creek Mining Co. ditch, on this ditch here, amount to as much as the work on your 3,000 foot ditch? As to the amount of labor and result, does what they have done in two years amount to as much as this \$800 ditch of yours? A. No, sir.

Q. Half as much? [85—74] A. No, sir.

Q. Did you in the fall of 1911 know of the Cache Creek Mining Co. hiring any horses,—the fall and winter of 1911, hiring any horses to anybody?

A. Yes, sir.

Q. Just state.

A. They hired them to us for freighting purposes.

Q. When was that?

A. That was in January, I think.

Q. In January, 1912? A. In January, 1912.

Q. What did they hire to you and at what figure?

A. Why we hired the outfit by the day—\$100 for the outfit.

Q. What was in the outfit?

Q. We had one horse and he took sick and was sick four days, and these four days we had seven horses of the Cache Creek Mining Co. in the outfit, besides four men.

Q. What was included in the outfit, horses and men and everything else?

A. There was seven horses for four days and six for four and a half and these double-enders—six double-enders and trailers and four men.

Q. Did the Cache Creek Mining Co. furnish everything? A. They furnished everything.

(Testimony of Louis Bub.)

Q. The board of the men and the feed for the horses?

A. The board of the men and the feed for the horses and everything.

(By Judge LYONS.)

Q. Were these horses used where the ditch work was done, the [86—75] horses you spoke about hiring?

A. No, sir, we never hired no horses on the ditch.

Q. How far was it away from the ditch?

A. This was on the trail.

Q. How far is that away from where these operations, this assessment work, was done?

A. We had them hired to land the stuff within five miles of there, 5½ miles, in a straight line.

Q. Did you use the men all the time within five miles of these claims?

A. No, sir, we didn't use them all the time.

Q. Where did you use them?

A. Just to land the stuff over there and we freighted from there down, up to the camp, with our horse.

Q. How far was it away from this work that was done on the ditch? A. About five miles.

Q. You were working within five miles of there all the time? A. No.

Q. How far were you away?

A. You mean in the summer time?

Q. When you were using these horses?

A. Sometimes really it would be fourteen miles

(Testimony of Louis Bub.)

away—one day, and the next day we go fourteen miles closer.

Q. Were horses any cheaper there than they would be right where this work was done?

A. I don't think so.

Q. What would it cost to get stuff from where you were using these horses in where the work was done on the ditch?

A. It wouldn't cost but very little more. [87—76]

Q. It wouldn't cost but very little more?

A. No, sir; we were freighting stuff in there, contracting to take stuff in there, for 7¼ cents a pound.

Q. How much is that a ton?

A. You can figure it out.

Q. That is a pretty good price per ton, is it not,—about \$150 a ton? A. Yes.

Mr. RITCHIE.—\$145 to be exact.

(By Mr. RITCHIE.)

Q. When you had this Cache Creek outfit, where did you freight from and where to?

A. From about seventeen miles along the trail to the mouth of Dollar Creek; it would be seventeen miles from McDougall.

Witness excused. [88—77]

[Testimony of John Rimmer, for Defendant.]

JOHN RIMMER, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. John Rimmer.

(Testimony of John Rimmer.)

Q. Where do you reside? A. Susitna.

Q. How long have you been up there?

A. About seven years and a half.

Q. Have you been working in the Yentna country?

A. Yes, sir.

Q. What is your business? A. Mining.

Q. Are you acquainted with the country around Dollar Creek? A. Yes, sir.

Q. Do you know Brahenburg and Bub and Anderson? A. Yes, sir.

Q. How long have you known them?

A. Since 1906.

Q. Where were you in September, 1911?

A. I was on Falls Creek.

Q. Do you know a place along Dollar Creek where the Cache Creek Mining Co. has started a ditch?

A. Yes, sir.

Q. How far were you working from them in September, 1911, when the work was being done?

A. About a mile, I guess—a little over, probably.

Q. What were you doing on Falls Creek?

A. Mining.

Q. Did you see any of this work when it was being done or afterwards? [89—78] A. Afterwards.

Q. Did you see it while it was going on?

A. I went by it at a distance and didn't see it.

Q. Describe to the jury just what that ditch was like shortly after they were working there in September, 1911.

A. It was just plowing and scraping, preliminary work,—that is all I could see.

(Testimony of John Rimmer.)

Q. About how long was it? A. About 1,400 feet.

Q. How wide and deep was it, on the average?

A. There are places 18 inches and other places it wasn't so deep—different depths and widths all through.

Q. Was there any place where the depth was very slight? A. Yes, just a sod pulled off.

Q. To what extent was that?

A. Probably two-thirds of it.

Q. At which end? A. The lower end.

Q. Where was the deepest work?

A. At the upper end.

Q. What were the going wages of men at that time in that district? A. Five dollars a day and board.

Q. Do you know what horses were worth up there?

A. I do not, only by what this packer packed for this summer—that is all I know.

Q. Are you familiar with the value of horses for working purposes in the interior country generally, as compared with the *ages* of men?

A. No, I am not. [90—79]

Q. Are you familiar with the country there along Dollar Creek, that is, the character of the ground?

A. Yes, sir.

Q. And do you know about how much work it takes to move such dirt as was moved by the Cache Creek Mining Co. there? A. I think I do.

Q. What would you say that work is worth?

By the COURT.—What is that work worth done the way the plaintiff says he did it, not what is it worth done some other way.

(Testimony of John Rimmer.)

Judge LYONS.—We object to it.

By the COURT.—I think it is competent. The weight of it is with the jury. He may answer. The jury may take into consideration what kind of work it was and what he knows about it—the whole weight of the evidence will be with the jury; I think I will admit it.

Plaintiff allowed an exception to the ruling.

A. Why, I think about \$150 would be a liberal allowance for that amount of work in the ditch.

Mr. RITCHIE.—That's all.

Cross-examination.

(By Judge LYONS.)

Q. Do you know how many days those horses worked up there? A. I don't know, no, sir.

Q. What is a horse worth a day up there?

A. I couldn't tell. I never use horses. I use dogs altogether.

Q. You don't know how many days the horses worked there? A. No, sir.

Q. And don't know how many horses worked there? A. No.

Q. You don't know how many men worked there?
[91—80]

A. There was four men with the cook and Anderson.

Q. How long were they working there?

A. Between a week and ten days, as near as I can tell you.

Q. What were those men worth per day?

A. Five dollars and their board.

(Testimony of John Rimmer.)

Q. And what is their board worth?

A. About two dollars, I guess; that is what they figure it in the camp there.

Q. That is about \$7 a day to the man?

A. Yes, sir.

Q. And there were four men working there?

A. Three men were working there, one was the cook.

Q. He was working there?

A. Yes, he was working on Falls Creek; yes.

Q. That was \$21 a day? A. Yes, sir.

Q. That itself would be over \$200, wouldn't it, for ten days?

A. Yes, for ten days, but we don't admit they worked ten days.

Q. How many days did they work?

A. You have the testimony of the men that know—I don't know positively; I couldn't say.

Q. You don't know whether they worked five or ten days? A. No, I do not.

Q. Suppose they worked ten days, that would be over \$150 for the men alone, according to your testimony? A. Yes, sir.

Q. You say you are about a mile from them, from that ditch?

A. Yes, just about, probably a little more.

Q. What time did you see the work after the work was done?

A. I have been over it numerous times. [92—81]

Q. After the work was done? A. Yes, sir.

Q. What were you doing over there?

(Testimony of John Rimmer.)

A. Hunting and walking around the country.

Q. Did you notice the work particularly?

A. I did; yes, sir.

Q. Now, I will ask you if that ditch, if there was more work done on it, couldn't that be made into a good serviceable ditch?

A. I guess it could, if it is ever finished; yes, sir.

Q. It could be finished, could it not?

A. It could be, yes—there is nothing impossible.

Q. That ditch is not impossible, is it?

A. No, sir.

Q. You are quite friendly to the defendants here?

A. Yes, sir.

Q. Did you see them plowing there?

A. At a distance, that is all.

Q. You were at a distance all the time?

A. While they were working there I was, yes—I never went by their work while they were working there.

Q. Are you a mining engineer? A. I am not.

Q. Just an every-day miner?

A. Just an every-day miner; yes, sir.

Witness excused. [93—82]

[Testimony of G. M. Callahan, for Defendant.]

G. M. CALLAHAN, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. G. M. Callahan.

Q. Where do you reside?

(Testimony of G. M. Callahan.)

A. At present in Valdez.

Q. What is your business?

A. I have been prospecting and mining.

Q. How long have you been a prospector and miner? A. Since 1898.

Q. How long have you been in Alaska?

A. I came to Dawson in '98.

Q. Have you been in various mining camps of the interior? A. I have.

Q. Are you familiar with the use of horses in mining? A. Well, not particularly in mining.

Q. Around mining work, in the mining country?

A. Yes, I am, in the mining country.

Q. What is the usual relation of wages between men and horses, that is, are horses worth less or more than men?

Judge LYONS.—We object to that as having nothing to do with the question, unless he was right in there in that country.

Mr. RITCHIE.—We want to show that everywhere in the interior there is a certain relative value between men and horses which would hold in that district, etc.

Objection sustained. Defendant allowed an exception.

Witness excused. [94—83]

[Testimony of Henry Brahenburg, for Defendant
(Recalled).]

HENRY BRAHENBURG, recalled.

(By Mr. RITCHIE.)

Q. Do you know from statements made at the

(Testimony of Henry Brahenburg.)

time, either by Mr. Anderson or the men he employed, what wages those men were receiving on that work? A. One hundred dollars per month.

Q. Do you know? A. Yes, sir.

Q. How do you know?

A. By the men that worked there.

Q. Carlson and Winters? A. Yes, sir.

Q. What did they say they were receiving?

A. \$100 per month.

Judge LYONS.—\$100 per month and board?

A. And board.

Q. And grub? A. Yes, sir.

Witness excused.

[Testimony of Louis Bub, for Defendant (Recalled).]

LOUIS BUB, recalled.

(By Mr. RITCHIE.)

Q. Do you know by statements made, either by the men who were working there, or Anderson, what wages the men were receiving on that ditch work?

A. Yes, sir.

Q. What was it? A. \$100 per month.

Q. And board? A. And board.

Witness excused.

Defendant rests. **[95—84]**

REBUTTAL.

[**Testimony of Joseph Anderson, for Plaintiff (Recalled in Rebuttal).**]

JOSEPH ANDERSON, recalled by the plaintiff as a witness in rebuttal, testified as follows:

Direct Examination.

(By Judge LYONS.)

Q. What was the cost of that work—to build that ditch?

A. My figures when I stopped working on there was \$618, I think.

Q. In estimating that cost, did you charge anything for the tools used there? A. I did not.

Q. Did you charge anything for any other equipment there?

A. No equipment whatever—charged nothing for breaking of hammers or tools or anything of that kind.

Q. How large was that plow you used there?

A. It was either a fourteen or sixteen inch breaking plow—I have forgotten which; not less than 14.

Q. That is the furrow you would cut would be 14 or 16 inches wide? A. Yes.

Q. What kind of a formation did you have to plow there?

A. From the upper end of the ditch down to where this spur runs off here is all gravel; the plow in cutting the first furrow would hit gravel practically all the way and there is some large boulders we had to use picks to take out.

(Testimony of Joseph Anderson.)

Q. In some places? A. In some places.

Q. Where were these horses used that these defendants here testify about, the horses they hired from plaintiff?

A. They were used from about 17 miles the other side of [96—85] McDougall to the mouth of Dollar Creek. The average distance we had to haul the feed for them was only about half what it would be where the work was done at the ditch, a little over half the distance,—not very much.

Q. The cost of the feed for the horses would be much less where they were working the horses than it would be where you were working?

A. Yes, sir.

Q. Much less?

A. Considerably less, because we never moved any horse feed.

Judge LYONS.—That is all.

(By Mr. RITCHIE.)

Q. The same freight is paid to McDougall on that hay as anywhere else?

A. To McDougall, yes.

Q. And aren't horses worth more in the winter time than in the summer? A. No.

Q. Doesn't it take more to feed a horse in cold weather than warm weather?

A. Not when they are working hard—I can't see any difference.

Q. In the summer time we can turn a horse out when he is not working and he will graze.

A. Yes, when he is not working.

(Testimony of Joseph Anderson.)

Q. And winter time you have to feed him right along? A. Yes, sir.

Q. And the horse is really worth more and brings more, the demand being equal, in winter time than summer time?

A. No, not when he is working, because everywhere where they use horses, in Nome and Iditarod, is what they bring there [97—86] for most every kind of work.

Q. You figure the value of this ditch work was \$618—how do you put that together? Give me the items, please.

A. Well, Victor Carlson, September 9, 10, 11, 12, 13, 14, 15 and 16.

Q. Eight days—what do you allow for his work?

A. \$100 a month and board.

Q. What do you figure his board worth?

A. Three dollars a day.

Q. And for eight days he would be entitled to a little over \$25 wages, a small fraction over a quarter of a month? A. Wages, without the board.

Q. Yes—it would be \$26 or \$27 for his wages?

A. Something like that.

Q. And eight days' board would be \$24?

A. Yes.

Q. Then for each of those men, including the cook, their board and wages would be about \$50 altogether for those eight days?

A. But the cook was receiving more than that—he was receiving \$125.

Q. The two men that worked for \$100 a month, they

(Testimony of Joseph Anderson.)

were paid about \$50 apiece, board and all?

A. \$50.64.

Q. That would be \$101.28 for the two. Now, what do you figure the cook was paid? A. \$71.60.

Q. And what did you receive? A. \$88.

Q. And Charley Nawn? [98—87] A. \$6.33.

Q. That was for work in packing over there?

A. Yes, sir.

Q. He didn't do anything on the ground?

A. Not on the ground itself.

Q. What he did was to help at the camp?

A. It was packing up the outfit used there, getting everything ready while the other men were doing the other work.

Q. Wasn't that all charged against freight?

A. No, sir, we had to pay him for his time just the same.

Q. Do I understand you to say that the grub is worth \$3 a day that the men ate there?

A. With the cook's wages included.

Q. You are charging the cook's wages—you can't charge the cook's wages on the grub and then pay the cook besides—which way did you figure the three dollars?

A. That is right—it must be with the cook's wages included.

Q. Now, what are the other items of this \$618?

A. Three horses, \$117 each, nine days each.

Q. Where did you get in the nine days?

A. One day packing over.

Q. What did you figure the horses at?

(Testimony of Joseph Anderson.)

A. \$13 apiece.

Q. That is what they are worth, keep and all?

A. That is what they are worth, keep and all.

Q. \$39 a day for the three horses?

A. Yes.

Q. For the nine days? A. Yes, sir.

Q. That would be \$351? [99—88]

A. \$351 I think is right.

Q. That comprises all the items?

A. Outside of—I made no charge for use of equipment or anything like that.

Q. Is it usual to employ a cook for a camp of three men?

A. It is usual because we have a cook all the time there and consequently had to pay him and he done other work around.

Q. Did he do any work on the ditch?

A. No, but he was fixing our tent and things that we would have had to stop and do, if he hadn't been there—getting wood and all that kind of thing.

Q. He was employed all the time?

A. He was employed all the time.

(By Judge LYONS.)

Q. It came out here in the testimony that you were not doing any work yourself over on the ditch—is that true?

A. Well, I was using a pick and loosening up the dirt so that they could get at it with the scraper and getting out loose rock, if that was work.

Q. You stayed right on your ground?

A. Yes, sir, all the time.

(Testimony of Joseph Anderson.)

Q. You didn't go over to see what Brahenburg and Bub were doing? A. No, sir.

By Mr. RITCHIE.—Your men were working steadily all the time? For the eight days?

A. They were working steadily all the time.

(By JUROR.)

Q. You figure those horses at \$13 a day—had you any other work for those horses at the same time? [100—89] A. Yes, sir.

By the COURT.—Do you mean that during those eight days those horses did other work?

JUROR.—No, had they other work for them?

By the COURT.—At or about that time?

JUROR.—Yes, sir.

The WITNESS.—Yes, sir.

Q. How long did it take to survey that ditch approximately?

A. I don't really remember—I went over it several times and had to go up to the head of the creek to see what kind of an intake I had and what the conditions were along there—I don't remember how many times I was over there.

Q. What are the wages of surveyors in that country per day?

A. That I couldn't answer because I don't think there was a surveyor there, except the engineer we had there for two years.

Mr. RITCHIE.—Are you a surveyor yourself?

A. No, sir.

(By Mr. RITCHIE.)

Q. At the time you walked over there to make that

(Testimony of Joseph Anderson.)

preliminary survey you were working on a general salary for the company? A. Yes.

Q. Your general work was merely supervision of all other work? A. Yes, sir.

Q. What was your salary?

A. I think the first time I was there it was \$200 a month and at the time of this assessment work it was \$5 a day.

Q. You mean thirty days in the month, \$5 a day?

A. Yes, sir.

Q. When you went over there to make that preliminary survey [101—90] were you neglecting any other work? A. No.

Witness excused.

Judge LYONS.—That is all the testimony I have.

Mr. RITCHIE.—I want to recall the witness Brahenburg on a matter I overlooked.

By the COURT.—Very well.

[Testimony of Henry Brahenburg, for Defendant
(Recalled in Rebuttal).]

HENRY BRAHENBURG, recalled.

(By Mr. RITCHIE.)

Q. When did you locate this claim?

A. The first day of August, 1912.

Q. What did you do about locating it?

A. I just located it the same as I would any other claim.

Q. Tell what you did.

A. Put up a notice; it already had stakes on,—I used the same stakes; just put up a notice, an extra

(Testimony of Henry Brahenburg.)

notice—the old notice there had disappeared.

Q. When you finished locating were the corner stakes on the ground? A. Yes, sir.

Q. The old stakes were there all the time?

A. Yes, sir.

Q. Just state what stakes were on the ground.

A. Well, the four corner stakes and the two center stakes, they were willow stakes.

Q. There were four corner stakes? A. Yes, sir.

Q. Did you make a discovery or did you have any knowledge of mineral on the ground? [102—91]

A. No, never had done any work on it at all.

Q. Did you have any knowledge of the existence of mineral on the ground?

A. Yes, a little—I know what little work had been done on it before that—there was a little money there.

Q. There was pay there?

A. Yes, shallow ground, a very steep creek, and narrow.

Q. Did you record the notice? A. Yes, sir.

Q. You have that notice here, have you?

A. Yes, I have it here—I haven't it with me, though, just now.

Q. Where is it? A. Down at my room.

(Recess for five minutes to enable witness to get notice.)

Q. Have you a copy of your notice of location which you filed? A. Yes, sir—this is a copy of it.

Q. Is this the copy that was filed? A. Yes, sir.

Mr. RITCHIE.—We offer it in evidence, including the record on the back.

(Testimony of Henry Brahenburg.)

Admitted without objection and marked Defts. Exhibit #4.

Mr. RITCHIE.—That is all.

Cross-examination.

(By Judge LYONS.)

Q. When did you locate that claim?

A. The first day of August, 1912.

Q. Will you explain to the jury just what you did when locating that claim?

A. I just located it the same as I would any other claim—put up the notice. [103—92]

Q. Where did you put up the notice?

A. On the upper end of the claim, on the center post that had been standing there for seven or eight years,—seven or eight or nine years.

Q. On the same post?

A. The center post on the creek, at that end of the claim—no, I believe the old location was down at the lower end.

Q. The old location notice? A. Yes, sir.

Q. What kind of a notice did you put up on your post? A. That is a copy of it.

Q. A copy of that? A. Yes, sir.

Q. What did you do then, when you put up that notice?

A. The next thing I done was to get it recorded.

Q. Get the notice recorded?

A. Yes, in probably a month or later,—I forget the date.

Q. Then what did you do?

A. I worked assessments on the claim.

(Testimony of Henry Brahenburg.)

Q. When did you do the assessment work?

A. I done it last fall and a year ago.

Mr. RITCHIE.—We object as immaterial, because it is not necessary for him to do any assessment work at all this year; it was located under the old law which only made it necessary to do assessment work in the following calendar year.

Judge LYONS.—I will withdraw the question.

By the COURT.—The act of Congress changing the law for doing the assessment work—I forget what month that was passed in.

Mr. RITCHIE.—I think it was about August 12, 1912.

By the COURT.—You testified you did the assessment work in [104—93] 1912, anyway?

A. Yes, I did two assessment works on it.

Q. 1912 and 1913? A. Yes, sir.

Q. Refer more particularly to what you did toward the location of the claim; you say you posted up a copy of your location notice on the discovery post—what did you do after that?

A. We didn't do anything, we just located it; the stakes were all up; we went around to the stakes; there was no use my putting up any more stakes; they were all up. I put new blazes on them and re-marked them, that is all, about all, I did do to it until I did the assessment work that fall for 1912.

Q. Did you know that property belonged to the Cache Creek Mining Co.?

A. Yes, I did, that they did own it, yes—at one time.

(Testimony of Henry Brahenburg.)

Q. Hadn't they done some work there in the month of July, 1912?

A. After I located, yes; there was three years there there never has been any work done on the whole of Dollar Creek by the Cache Creek people, never has.

Q. Don't you know as a matter of fact that Joe Eberhardt was working there in July, 1912?

A. After the claim was in dispute, he went to work on it, yes.

Q. When did the claim get in dispute?

A. The first day of August.

Q. He didn't do any work in July?

A. He was over there, but he didn't do any work, I know of.

Q. Didn't he do some prospecting work in the month of July, 1912?

A. He was over there trying to figure out a pay-streak through there, yes. [105—94]

Q. You know Eberhardt? A. Yes.

Q. As a matter of fact, the reason you took this claim, you wanted it as a dumping ground for your own property?

A. That is all it is probably worth to us.

Q. Weren't you served with a notice by the Cache Creek Mining Co. in the month of August to get off the property, it was their property?

A. Yes, I did, except working assessment work on it.

Q. Did you get a notice from the Cache Creek Mining Co. to keep off of there? A. I did.

Q. That the property belonged to them?

(Testimony of Henry Brahenburg.)

A. They gave us a notice, yes.

Q. You simply went in and jumped the property?

A. Yes, I went in and jumped the property, if you call it jumping—relocated it.

Judge LYONS.—That is all.

By Mr. RITCHIE.—The notice you received from the Cache Creek Mining Company was after you had relocated?

A. Yes, it was afterwards.

(By the COURT.)

Q. You say that you re-marked the stakes—what did you put on them when you re-marked them?

A. Well, they were all weather-worn stakes and I just reblazed them and put the numbers—they were numbered, each corner post—just put a mark and number all the way around.

Q. Did you put on anything to show that you were claiming the claim? [106—95]

A. No, only on the initial stake where the notice was and the corner stakes and the other center stake was just the number.

(By Judge LYONS.)

Q. Did you find any mineral on the ground at that time? A. Oh, yes, I found mineral there.

Q. Did you find any gold there?

A. Nothing but a prospect, nothing but a very small prospect.

Q. When did you find that?

Mr. RITCHIE.—We object—if he knew of it any time before the location, it is a sufficient discovery.

By the COURT.—I think that is admitted in the

(Testimony of Henry Brahenburg.)

pleadings, Judge Lyons. You charge him with taking gold from it.

Judge LYONS.—I suppose our title is not disputed at all, in any way.

Mr. RITCHIE.—Except the failure to do the assessment work, that is conceded. It was located by Eberhardt and Anderson and transferred to the Cache Creek Mining Co. and at one time they owned it.

By the COURT.—It is admitted in the pleadings that you owned the claim and you still own it unless you have relinquished it by failure to do the assessment work.

Mr. RITCHIE.—Yes, sir, that is correct.

Judge LYONS.—I want to put Mr. Anderson on to show that Eberhardt did the assessment work in July, 1912.

Mr. RITCHIE.—I shall object to that for the reason that under the decision of the Circuit Court of Appeals if the company failed to do the work in the year 1911 the claim was wholly forfeited at midnight on the 31st of December. [107—96]

By the COURT.—I don't know just what Judge Lyons wishes to show. You may proceed.

Judge LYONS.—I want to show there was no abandonment of the claim on our part and all our work has been prosecuted in good faith all the way through.

[**Testimony of Joseph Anderson, for Plaintiff (Recalled in Rebuttal).**]

JOSEPH ANDERSON, recalled.

(By Judge LYONS.)

Q. You have already testified that you are familiar with Number One above on Dollar Creek?

A. Yes, sir.

Q. Do you know George Eberhardt?

A. Yes, sir.

Q. I will ask you if Eberhardt did any work on that claim in July, 1912?

A. Eberhardt and a man named Hurd went over there along about the 15th or 20th of July—I am not sure about the date—and done some prospecting there and afterwards, in July, Eberhardt went over there and was gone I think three days prospecting and said he was prospecting on the claim.

Mr. RITCHIE.—I don't think this is competent, but since Judge Lyons suggested it was wholly to show the good faith of the company I will not object.

Q. Did you see any of those stakes on Number One above on Dollar, after it was located by the defendant? A. I saw nothing but the old stakes.

Q. He didn't put up any new stakes?

A. Not to my knowledge.

Q. Any blazes on those stakes?

A. Not that I seen.

Q. Was there any change at all made in the stakes by Brahenburg? [108—97]

(Testimony of Joseph Anderson.)

A. I can't recall any.

Q. Did you see any notice on the claim, on a post at the center end?

A. I did long after it was located—after I was told about it.

Q. Did you serve a notice on him to the effect that the company claimed that property? A. I did.

(By Mr. RITCHIE.)

Q. They served a notice on you too?

A. Verbally.

Q. No written notice? A. No.

Q. Did you make a careful examination of those corner posts? A. No, not very careful.

(By JUROR.)

Q. You said that Eberhardt worked on the claim—did you send Eberhardt over there? Was he working for the Cache Creek Mining Co. at the time?

A. He had a lease on the ground.

Q. And he told you he was prospecting there?

A. He told me he was prospecting there.

Q. I think in your statement you said that ground went \$22 to the man or shovel—how do you arrive at that figure?

A. I think I said that the best that was taken off of it was \$22 a man in one day using a pick and shovel.

Q. Then he must have been sluicing?

A. Yes, sluicing.

By Mr. RITCHIE.—Did you ever see any written notice posted up on the claim by Brahenburg & Bub

(Testimony of Joseph Anderson.)

notifying trespassers to keep off? [109—98]

A. I did not.

Witness excused.

Testimony closed.

Instructions of the Court.

Gentlemen of the Jury:

It will not be necessary to give you any very extended instructions in this case because a great deal of the matter that usually goes to a jury for their determination in an ejectment suit on a mining claim is agreed to, that is, is not in issue; for instance, it is not in issue here that the plaintiff discovered gold and duly staked their claim according to law; it is not in issue here and there is no question before you that the defendant went upon this mining claim and took possession of it; there is no issue before you as to what damages have been caused. In other words, you have nothing to do with damages and you have nothing to do with deciding the question as to whether the defendant went upon the claim and took possession of it; you have nothing to do with the question as to whether or not the plaintiff discovered gold and staked the claim, because those things are admitted.

In this case it is also admitted that on the 31st day of December, 1910, the plaintiff had a good and indefeasible title to this claim; that is to say, it is admitted that before that time, December 31, 1910, they had discovered gold on the claim and had staked it according to law. That being the case they were the actual owners of said claim on said date, December 31, 1910, and they continue to own the claim to

this date unless [110—99] it has been shown to you by a preponderance of the evidence that they have not done the assessment work for the year 1911.

If you believe that it has been established by a preponderance of the evidence in this case that the plaintiff did not in the year 1911 do one hundred dollars' worth of work upon said claim, or to develop said claim—the work need not be done right on the claim, if it was done to develop the claim, done for the benefit of the claim—then on the 31st day of December, 1911, the claim became forfeited and open to relocation by any one else.

The defendants in this case claim and have offered evidence to prove that they relocated the claim according to law and there has been no evidence to the contrary, but this is not all they have to prove—they have to prove to you by a preponderance of the evidence that one hundred dollars' worth of work was not done by the plaintiff in the year 1911.

In other words, having admitted that the plaintiff had a good and indefeasible title and claiming as they do—that is, the defendants claiming as they do—that that title has been forfeited by the failure to perform assessment work, the burden is upon them to prove to you that the assessment work has not been done.

They have introduced evidence to show that it was not done. The plaintiff has introduced evidence to show that it was done—so the only question before you is as to whether or not it was done. If it was done, your verdict must be for the plaintiff; if it was not done, your verdict must be for the defendant.

Now, the question as to whether assessment work has been done or how much has been done has been the cause of innumerable controversies. Every relocator is interested in depreciating [111—100] the value of work performed by the original locator, and the original locator is interested in saving his claim from forfeiture. It is largely a question of opinion, upon which practical miners and experts will disagree. It is probable that testimony could be obtained to show that nearly all the annual assessment work done upon mining claims was of less value than the law required, excepting in cases where it so greatly exceeds the sum of one hundred dollars that there is no question about it.

While the amount paid is not conclusive that work of that value has been done, but the actual value is the true test whether or not the law has been complied with, yet, where the testimony is conflicting as to the value, it is proper to consider whether there has been a *bona fide* attempt to comply with the law.

In determining the amount of work done upon a claim, or improvements placed thereon for the purpose of representation, the test is as to the reasonable value of the said work or improvements—not what was paid for it or what the contract price was, but it depends entirely upon whether or not the said work or improvements were reasonably worth the said sum of one hundred dollars.

A mere expenditure is not sufficient. The work must tend to develop the claim and must be of the reasonable value claimed.

Cost is an element in establishing the value, and

while not conclusive strongly tends to establish the good faith of the claimant.

Now, the question is entirely one with you. You are not to have any prejudice against the plaintiff, nor any bias in his favor, nor to try the parties otherwise than as if they were just A and B—you don't know anything about A and you don't know [112—101] anything about B. There is just that question before you, the question to be decided upon the evidence that has been introduced. As one counsel has said and as the other might just as well have said, you are at liberty to use your own common sense about this case—you are not supposed to be a dummy. If there is any matter that is absolutely and entirely within the knowledge of other men, why you are not supposed to be any more ignorant than anybody else, but take the evidence as you have heard it and use your common sense in deciding the question.

And in determining who you want to believe, take all the facts and circumstances into consideration, weigh the testimony and don't count it—testimony is not to be counted by the number of witnesses, but it is to be weighed by its intrinsic worth; that is to say, consider what opportunities the men had who testified to know what they were testifying about, consider their willingness or unwillingness to tell the truth and the whole truth, their candor or lack of candor and their interest in the matter—take all these things into consideration and by a careful comparison and consideration of all the evidence in the case make up your mind on which side is the pre-

ponderance of the testimony.

I hand you two forms of verdict, one for the plaintiff and one for the defendant. Have your foreman sign whichever verdict you agree upon and return it into court.

Mr. RITCHIE.—I want to take an exception; shall I do it now?

By the COURT.—You may take it after the jury retires.

[Exceptions to Instructions.]

The jury having retired—

By Mr. RITCHIE.—The defendant excepts to so much of the instructions of the Court to the jury as stated that the burden of proof of forfeiture is upon the defendant in this case.

(Exception allowed.) [113]

[Certificate of Stenographer to Transcript.]

I do hereby certify that I am the official Court Stenographer for the Third Judicial Division of Alaska; that as such official court stenographer I reported the proceedings in the above-entitled action, to wit, Cache Creek Mining Co. vs. Henry Brahenburg; that the above is a full, true and correct transcript of my shorthand notes taken at the trial of said cause.

Dated at Valdez, Alaska, this 6th day of January, 1914.

I. HAMBURGER. [114]

*In the District Court for the Territory of Alaska,
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corporation,

Plaintiff,

vs.

HENRY BAHRENBURG,

Defendant.

Verdict.

We, the jury impaneled and sworn in the above-entitled cause, do upon our oaths find for the defendant, that he is the lawful owner and entitled to the possession of the mining claim known as Number One above Discovery on Dollar Creek, Yentna Mining District, Territory of Alaska.

G. H. REMINGTON,

Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 26, 1913. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Entered Court Journal No. 8, page No. 1. [115]

*In the District Court for the Territory of Alaska,
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corpo-
ration,

Plaintiff,

vs.

HENRY BRAHENBURG,

Defendant.

Judgment.

This cause came on for trial on the 25th day of November, A. D. 1913; plaintiff appearing by its counsel, John Lyons, and the defendant appearing in person and by his attorney, E. E. Ritchie. A jury of twelve men was duly empaneled and sworn to try the cause. The parties introduced their testimony and rested. After arguments by counsel, the Court instructed the jury and the jury retired on the same day to deliberate upon their verdict. It was stipulated by counsel that if the jury should find a verdict, the same might be returned as a sealed verdict on the following day. Thereafter, on the 26th day of November, the jury returned into court and by their foreman returned their sealed verdict into court, by which verdict they found for the defendant, that he is the lawful owner and entitled to the possession of the mining claim, known as "Number One above Discovery" on Dollar Creek, in the Yentna Mining District, Territory of Alaska.

THEREAFTER, on the same day, the plaintiff, by its attorney, John Lyons, moved the Court for a new trial of said cause, which motion was argued by counsel on the same day and was by the Court denied.

It was thereupon stipulated by and between the parties in open court, that plaintiff should have ninety days [116] (90) in which to prepare and settle a bill of exceptions on appeal herein.

Wherefore, by reason of the law in the premises, hereinbefore recited,

IT IS ORDERED AND ADJUDGED by the Court that the defendant is the owner, subject to the paramount title of the United States, and entitled to the possession of the mining claim known as "Number One above Discovery" on Dollar Creek, in the Yentna Mining District, Territory of Alaska; and that the defendant recover his costs in this action, taxed at \$——.

ROBERT W. JENNINGS,
District Judge.

Dated at Valdez, Alaska, this 26th day of November, A. D. 1913.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 26, 1913. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Entered Court Journal No. 8, page No. 9. [117]

*In the District Court for the Territory of Alaska,
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corpo-
ration,

Plaintiff,

vs.

HENRY BRAHENBURG,

Defendant.

Motion for New Trial.

Comes now the plaintiff in the above-entitled action, by its attorney, John Lyons, and moves the Court for an order to set aside the verdict rendered by the jury on the 26th day of November, 1913, and to grant a new trial of this cause, upon the following grounds, to wit:

I.

Newly discovered evidence, which could not have been produced by the plaintiff in the trial of said cause, as appears by the affidavit of Joseph Anderson hereto attached.

II.

Insufficiency of the evidence to justify the verdict rendered by said jury and that it is against the law. The evidence of the plaintiff showed that the said plaintiff constructed a ditch about sixteen hundred feet in length, for the purpose of conducting water from a point near the source of Dollar Creek, in the Yentna Mining District, in the Territory of Alaska,

to wash the gold-bearing gravel on the mining claim, involved in said action, and that the construction of said ditch, constituted assessment work, and tended to the development of said claim. The defendants produced no evidence denying that said work would develop said claim or tend to its development.

III.

Error in law occurring at the trial, and excepted [118] to by the plaintiff, in this, that the trial Court erred in refusing to permit the plaintiff to introduce in evidence the affidavit of annual labor, executed by Joseph Anderson, to the effect that said labor and improvements were made by the plaintiff for the benefit of said mining claims for year 1911.

JOHN LYONS,
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Nov. 26, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [119]

*In the District Court for the Territory of Alaska,
Third Division.*

CACHE CREEK MINING COMPANY, a Corporation,
Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

Affidavit of Joseph Anderson.

United States of America,
Territory of Alaska,—ss.

Joseph Anderson, being first duly sworn according to law, deposes and says: That he is the manager and superintendent of the plaintiff in the above-entitled action, and as such superintendent the work performed by said plaintiff in the month of September, 1911, in doing the annual labor required by law, on the mining claim known as No. 1 above on Dollar Creek, in the Yentna Mining District, in the Territory of Alaska, which is the claim in controversy in this action; that he has discovered certain evidence, which could not with reasonable diligence be produced at the trial of said cause; that the names of said witnesses are George Winter, Victor Carlson, Andy Thomas, and George Eberhardt, who will each testify that said work was performed in accordance with law; that the said Winter, Carlson and Thomas were working for the plaintiff in the month of September, 1911, at the time the plaintiff constructed a certain ditch, for the development and benefit of said mining claim; that the said Eberhardt made an examination of said work after the same was completed, and that he will testify that the work performed was worth the sum of six hundred dollars, and that it tended to [120] the development of said claim.

JOSEPH ANDERSON.

Subscribed and sworn to before me this 26th day of November, 1913.

[Seal]

JOHN LYONS,

Notary Public for Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Nov. 26, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

United States of America,
Territory of Alaska,—ss.

DUE AND LEGAL SERVICE IS HEREBY
ACCEPTED this 26th day of November, A. D. 1913,
by receiving a copy thereof, duly certified to by John
Lyons, one of the attorneys for the plaintiff.

E. E. RITCHIE,

Attorney for Defendants. [121]

SPECIAL NOVEMBER, 1913, TERM—NOVEM-
BER 26th—9th COURT DAY, WEDNESDAY.

*In the District Court for the Territory of Alaska,
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corpo-
ration,

Plaintiff,

vs.

HENRY BRAHENBURG,

Defendant.

Minute Order Denying New Trial.

Now, on this day, came John Lyons, attorney for the plaintiff, and E. E. Ritchie, attorney for the de-

fendant, and this matter coming on for hearing upon plaintiff's motion for a new trial, and after arguments had and the Court being fully advised in the premises, said motion for a new trial is hereby denied.

Entered Journal No. 8, page No. 2. [122]

*In the District Court for the Territory of Alaska,
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

Bill of Exceptions.

Be it remembered that on the 27th day of March, 1913, plaintiff filed its complaint in the above-entitled court and cause. (Here insert copy of complaint.)

That on the 2d day of June, 1913, the defendant filed his answer in said cause (here insert copy of answer), and on the 3d day of June, 1913, the plaintiff filed its reply (here insert copy of reply); that thereafter and on the 25th day of November, 1913, the said cause came on regularly for trial before the court and a jury, and thereupon the following proceedings were had, to wit:

The plaintiff submitted its evidence by the oral testimony of Joseph Anderson and the depositions of

Malcolm McDougall and R. J. Cameron, and thereupon rested its case.

Thereafter the defendant submitted his evidence, by the oral testimony of the defendant, Louis Bub, John Rimmer and G. M. Callahan.

That thereafter and on the 25th day of November, 1913, the Court instructed the jury, and the jury having retired returned a verdict in favor of the defendant.

That on the said 26th day of November, 1913, the plaintiff filed its motion for a new trial, which was by the Court denied. (Here insert copy of motion for a new trial and order denying the same.) To which order plaintiff excepted and exception allowed.

That on the said 26th day of November, 1913, the Court made and entered its judgment herein, adjudging the defendant to be the owner, and entitled to the possession of that certain mining claim known as No. 1 above Discovery on Dollar Creek, in the Yentna Mining District, Territory of Alaska, and for his costs [123] in this action. (Here insert copy of judgment.)

Now comes the plaintiff in the above-entitled cause, and does make and file this its bill of exceptions, and prays the Court to file and settle the same, and have said bill of exceptions made a part of the record in said cause:

1. The plaintiff excepts to the ruling of the Court in admitting the evidence of the witness Rimmer, concerning the value of the work performed by the plaintiff, in doing its assessment work on the mining claim in dispute, namely, No. 1, above discovery on Dollar

Creek, in the month of September, 1911.

2. The plaintiff excepts to the ruling of the Court, in denying its motion for a new trial, made and entered on the 26th day of November, 1913.

3. The plaintiff excepts to the judgment of the Court entered in said cause on the 26th day of November, 1913, in favor of the defendant and against the plaintiff.

JOHN LYONS,

Attorney for Plaintiff and Appellant.

Order Allowing Bill of Exceptions.

The above and foregoing bill of exceptions and each of them are by this Court duly allowed, and such exceptions are hereby ordered filed and made a part of the record in said cause.

Dated this 16th day of February, 1914.

FRED M. BROWN,

District Judge.

Due and legal service is hereby accepted and admitted of the foregoing bill of exceptions, by receiving a copy thereof, this 16th day of February, 1914.

E. E. RITCHIE,

Attorney for Defendant and Appellee.

Entered Court Journal No. 8, page 111.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk.
By T. P. Geraghty, Deputy. [124]

*In the District Court for the Territory of Alaska,
Third Division.*

#S.—33.

CACHE CREEK MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

Petition for Writ of Error.

Comes now the Cache Creek Mining Company, plaintiff in the above-entitled cause, and says: That on the 26th day of November, 1913, a verdict was rendered by a jury, in favor of the defendant in the above-entitled cause, and judgment entered thereon by the above-entitled court, adjudging the defendant to be the owner of that certain placer mining claim known as No. 1 above Discovery on Dollar Creek, in the Yentna Mining District, in the Territory of Alaska, and for his costs and disbursements in this action.

That in the said judgment and the proceedings had prior thereto, certain errors were committed, to the prejudice of the plaintiff, all of which will more fully appear in the assignment of errors, which is filed with this petition.

Wherefore plaintiff prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and that a tran-

script of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

JOHN LYONS,

Attorney for Plaintiff and Appellant.

Due and legal service by copy of the above petition is hereby accepted and admitted this 13th day of January, 1914.

E. E. RITCHIE,

Attorney for Defendant and Appellee.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 16, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [125]

*In the District Court for the Territory of Alaska,
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

Assignment of Errors.

Comes now the Cache Creek Mining Company, the plaintiff in the above-entitled action, and makes and files the following assignment of errors, upon which the plaintiff will rely, in the prosecution of its writ of error, herein.

First. The Court erred in admitting the testimony of the witness Rimmer, which was objected to by the plaintiff, and which was in reference to the value of the assessment work performed by the plaintiff, in the month of September, 1911, for the reason that the witness testified and admitted, that he was unable to state the number of days that the plaintiff was actually engaged in performing said assessment work. On direct examination said witness testified as follows:

“Mr. RITCHIE.—What would you say that work is worth?

By the COURT.—What is that work worth done the way the plaintiff says he did it, not what it is worth done some other way?

Judge LYONS.—We object to it.

By the COURT.—I think it is competent. The weight of it is with the jury. He may answer. The jury may take into consideration, what kind of work it was and what he knows about it—the whole weight of the evidence will be with the jury; I think I will admit it. Plaintiff allowed an exception to the ruling.

A. Why I think about \$150 would be a liberal allowance for that amount of work in the ditch.

Cross-examination.

Q. Do you know how many days those horses worked up there?

A. I don't know; no, sir.

Q. What is a horse worth a day up there?

[126]

A. I couldn't tell; I never use horses; I use dogs altogether.

Q. You don't know how many days the horses worked up there? A. No, sir.

Q. You don't know how many men worked up there?

A. There was four men with the cook and Anderson.

Q. How long were they working there?

A. Between a week and ten days as near as I can tell you.

Q. You don't know whether they worked five or ten days? A. No, I do not."

Second. The Court erred in denying plaintiff's motion for a new trial, for the reason,—

(a) Newly discovered evidence, which could not have been produced by the plaintiff in the trial of said cause, pursuant to the affidavit attached to said motion, made by Joseph Anderson in support of the same, and which was not controverted by the defendant.

(b) Insufficiency of the evidence to justify the verdict, which was rendered by the jury, and that said verdict is against the law. The proof shows that the plaintiff expended the sum of \$618.00, in the performance of the assessment work on the claim in dispute, together with five other claims, which fact is nowhere denied by the defendant.

Third. The Court erred in entering judgment in said cause against the plaintiff and in favor of the defendant, for the reason that said judgment is against the law. The question of whether or not the annual assessment work was performed on the mining claim known as No. 1, above on Dollar Creek in the year

1911, is the only issue on said cause. It is apparent from the record that the plaintiff performed in the year 1911, \$618.00 worth of labor and improvements on or for the benefit of six mining claims on Dollar Creek, including the claim in dispute, in the month of September, 1911, which is not denied by the defendant.

Wherefore the plaintiff in error prays that the said judgment of the District Court for the Territory of Alaska, Third Division, may be reversed. [127]

JOHN LYONS,

Attorney for Cache Creek Mining Company, and
Plaintiff in Error.

Due and legal service of the foregoing assignment of errors is hereby accepted, by receiving a copy of the same, this 18 day of February, 1914.

E. E. RITCHIE,

Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [127½]

*In the District Court for the Territory of Alaska,
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

Order Allowing Writ of Error.

Now on this —— day of February, 1914, the plaintiff appearing by its attorney, John Lyons, and filed and presented to the Court its petition, praying for the allowance for a Writ of Error, and the assignment of errors intended to be urged by it; and praying further that a transcript of the record and proceedings upon which the order and judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, therefore, in consideration of the premises, and the Court being fully advised, it is ordered that the aforesaid Writ of Error and the same is hereby allowed.

And it is further ordered that a transcript of the record, papers, files, and proceedings in this cause, duly authenticated, be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated this 18th day of February, 1914.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 117. [128]

*In the District Court for the Territory of Alaska,
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

Writ of Error (Copy).

To the President of the United States of America,
The Honorable ROBERT W. JENNINGS,
Judge of the District Court for the Territory of
Alaska, First Division, Acting as Judge in the
Third Division, in the Above-entitled Cause,
Greeting:

Because in the records and proceedings, as also in
the rendition of the judgment of a plea which is in
said District Court, before you, or some of you, be-
tween Cache Creek Mining Company, plaintiff, and
Henry Brahenberg, defendant, manifest error hath
happened, to the great damage of the said Cache
Creek Mining Company, plaintiff, as is stated and ap-
pears by the petition herein.

We being willing that error, if any hath been, shall
be duly corrected, and full and speedy justice done to
the parties aforesaid in this behalf, do command you,
if judgment be therein given, that then under your
seal, distinctly and openly, you send the record and

proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same in the city of San Francisco, in the State of California, within sixty days from the date of this writ, in said Circuit Court of Appeals for the Ninth Circuit, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, and of the Territory of Alaska should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 18 day of [129] February, A. D. 1914.

Attest my hand and the seal of the District Court for the Territory of Alaska, Third Division, in the clerk's office at Valdez, Alaska, on the day and year last above written.

[Seal]

ARTHUR LANG,

Clerk of the District Court for the Territory of Alaska, Third Division.

Writ of Error allowed this 18 day of February, 1914.

FRED M. BROWN,

District Judge.

Due and legal service of the foregoing writ of error is hereby accepted and admitted, by receiving a copy

thereof, this 18th day of February, A. D. 1914.

E. E. RITCHIE,

Attorney for Plaintiff and Defendant in Error.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 118. [130]

*In the District Court for the Territory of Alaska,
Third Division.*

#33—S.

CACHE CREEK MINING COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

Bond on Writ of Error.

Know All Men by These Presents, that we, Cache Creek Mining Company, as principal, and Meyer Blum and A. E. Grigsby, as sureties, are held and firmly bound unto Henry Brahenberg, the defendant in error, in the full sum of Five Hundred (\$500.00) Dollars, in lawful money of the United States, to be paid to the said Henry Brahenberg, his heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals, and dated this 16 day of February, 1914.

Whereas lately in the District Court for the Territory of Alaska, in the Third Division thereof, in an action at law pending in said court between Cache Creek Mining Company, plaintiff, and Henry Brahenberg, defendant, a judgment was rendered in favor of said defendant, and against the plaintiff, and the said Cache Creek Mining Company, having obtained a writ of error, and filed a copy thereof, in the clerk's office of said court, to reverse the judgment in the aforesaid action at law, and a citation directed to the said Henry Brahenberg, defendant, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, in the State of California, on or after the — day of —, A. D. 1914.

Now the condition of the above obligation is such, that if the said Cache Creek Mining Company, shall prosecute said Writ of Error to effect and answer all damages and costs that may be awarded against it, if it fail to make said appeal good, then [131] this obligation to be void; otherwise to remain in full force and virtue.

CACHE CREEK MINING COMPANY,

Principal.

By JOHN LYONS,

Its Agent.

M. BLUM,

Surety.

A. E. GRIGSBY,

Surety.

Signed, sealed and delivered in the presence of

JOHN LYONS,

CHARLES A. FOWLKES.

Approved by:

FRED M. BROWN,

District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [132]

*In the District Court for the Territory of Alaska,
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

Order Fixing Amount of Bond on Writ of Error.

The plaintiff the Cache Creek Mining Company having this day filed its petition for a Writ of Error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made, fixing the amount of security which plaintiff should give and furnish upon said writ of error, and said petition having been allowed,

Now, therefore, it is ordered, that upon the said plaintiff Cache Creek Mining Company, filing with the Clerk of this court, a good and sufficient bond, in the sum of five hundred dollars, to the effect that if the said plaintiff, and plaintiff in error shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void; else to remain in full force and virtue, the said bond to be approved by the Court, and that all further proceedings in this court be, and they are hereby suspended and stayed until the determination of said writ of error, by the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 16th day of February, 1914.

FRED M. BROWN,

District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 16, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 110. [133]

*In the District Court for the Territory of Alaska,
Third Division.*

#S.—33.

CACHE CREEK MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

Citation on Writ of Error (Copy).

United States of America,

Territory of Alaska,—ss.

The United States of America, to Henry Brahenberg
and to E. E. Ritchie, His Attorney of Record,
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City and County of San Francisco, in the State of California, within thirty days from the date of this writing pursuant to a Writ of Error, which is filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein Cache Creek Mining Company is the plaintiff in error, and you, Henry Brahenberg, is the defendant in error, and to show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 18 day of February, in the year of our Lord, 1914, and of the Independence of the United States, the one hundred and thirty-eighth.

FRED M. BROWN,

Judge of the District Court for the Territory of
Alaska, Third Division.

[Seal] Attest: ARTHUR LANG,
Clerk of the District Court for the Territory of
Alaska, Third Division.

Due and legal service of the foregoing citation by receiving a copy thereof is hereby accepted this 18 day of February, A. D. 1914.

E. E. RITCHIE,

Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. T. P. Geraghty, Deputy. [134]

*In the District Court for the Territory of Alaska,
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

**Order Extending Time in Which to File the Records
in the United States Circuit Court of Appeals
for the Ninth Circuit.**

It appearing to the satisfaction of the Court that thirty days is not sufficient time to prepare and send and have received by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, the records in the above-entitled cause, in the Writ of Error from the final judgment rendered herein on the 26th day of November, A. D. 1913:

It is therefore hereby ordered, that the said Cache

Creek Mining Company, plaintiff in error herein, have to the 1st day of April, 1914, in which to have prepared the said records on its Writ of Error heretofore issued in said cause, and to file the same in said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 18 day of February, A. D. 1914.

FRED M. BROWN,
District Judge.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. Entered Court Journal No. 8, page No. 120. [135]

*In the District Court for the Territory of Alaska,
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corporation,
Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

**Stipulation as to What shall Constitute the Record
on Writ of Error.**

It is hereby stipulated and agreed, by and between the parties to the above-entitled action, by their respective attorneys, that the following is and

shall constitute a full, true and complete record on the Writ of Error in the above-entitled cause, to wit:

- 1st. Complaint.
- 2d. Answer.
- 3d. Reply.
- 4th. Plaintiff's Exhibit "A" and Defendant's Exhibits Nos. 1, 2, 3 and 4.
- 5th. Bill of Exceptions and transcript of Evidence.
- 6th. Instructions to Jury.
- 7th. Verdict of Jury.
- 8th. Judgment.
- 9th. Motion for New Trial and affidavit of Joseph Anderson in support thereof.
- 10th. Order Denying New Trial.
- 11th. Order settling and allowing Bill of Exceptions.
- 12th. Petition for Writ of Error.
- 13th. Order Allowing Writ of Error.
- 14th. Order Fixing Amount of Bond.
- 15th. Assignment of Errors.
- 16th. Writ of Error.
- 17th. Bond on Writ of Error.
- 18th. Citation to Defendant in Error.
- 19th. Order extending time in which to file record in Circuit Court [136] of Appeals.
- 20th. Stipulation as to what shall constitute record on Writ of Error.

Dated at Valdez, Alaska, this 18 day of February, 1914.

JOHN LYONS,

Attorney for Plaintiff in Error.

E. E. RITCHIE,

Attorney for Defendant in Error.

[Endorsement]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

*In the District Court for the Territory of Alaska,
Third Division.*

Certificate of Clerk U. S. District Court to Record.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the above and foregoing, and hereto annexed 138 pages, numbered from 1 to 138, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office;

That this transcript is made in accordance with the plaintiff's and appellant's praecipe on file herein.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and that the cost thereof, amounting to \$62.10, was paid to me by John Lyons, attorney for plaintiff and appellant.

In witness whereof I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 25th day of February, A. D. 1914.

[Seal] ARTHUR LANG,
Clerk, District Court, Territory of Alaska, Third
Division. [138]

[Endorsed]: No. 2387. United States Circuit Court of Appeals for the Ninth Circuit. Cache Creek Mining Company, a Corporation, Plaintiff in Error, vs. Henry Brahenberg, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Received and filed March 10, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2387

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CACHE CREEK MINING COMPANY
(a corporation),

Plaintiff in Error,

vs.

HENRY BRAHENBERG,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

Statement of the Case.

This is an action in ejectment for possession of a mining claim known as Placer Claim Number 1 above Discovery on Dollar Creek, a tributary of Cache Creek in the Yentna Mining District, Territory of Alaska.

Plaintiff in Error began the action in March, 1913, and in its complaint alleged that on July 28, 1905, one Joseph Anderson located the said Placer Claim according to the Mineral Land Laws, and thereafter transferred his title to it, and that thereby it became and was the owner and entitled

to the possession of said Placer Claim, and it further alleged an ouster of possession by the Defendant in Error in 1912, and it further alleged that it had complied with all the Mineral Land Laws.

The Defendant in Error thereafter in June, 1913, filed his answer to the complaint and in Paragraph II (Transcript, page 6) admits the validity of Plaintiff in Error's title in the following language:

“He admits that Joseph Anderson located Claim Number One above Discovery on Dollar Creek, and that he thereafter conveyed his interest in said claim to Plaintiff as alleged, but denies that Plaintiff has performed the annual labor required by law to hold said claim since the year 1909, denies that it has performed any labor upon said claim since 1909, and alleges that all of plaintiff's right to and in said claim became forfeited in the said claim, and all of it became a part of the public domain subject to location according to law as mineral land long prior to the year 1912. Defendant alleges that on the 1st day of August, 1912, he located said Claim Number One above Discovery on Dollar Creek according to law, and ever since has been and now is the owner thereof, subject to the paramount title of the United States and is in actual possession thereof.”

In his said answer he further alleges he holds possession adversely to the Plaintiff in Error, and further alleges in Paragraph VI (Tr. p. 8) as follows:

“By way of cross-complaint Defendant alleges that he located said Claim Number One above Discovery according to law, and there-

after within ninety days, to wit, on the..... day of August, 1912, filed a copy of his notice of location thereof in the office of the Recorder of Cook Inlet precinct, in which said claim is situated, and has ever since said location had actual possession of the same.”

The Plaintiff in Error in its reply filed thereafter in June, 1913, denies the affirmative allegations of the answer of Defendant in Error.

The case came on for trial on the 25th day of November, 1913, before Judge Robert W. Jennings, and a jury, at Valdez, Alaska, and on November 26, the jury returned a verdict for the Defendant in Error. Thereafter on the same day the Court denied Plaintiff in Error's motion for a new trial (Tr. p. 126) and entered its judgment in favor of Defendant in Error (Tr. p. 124) from which Plaintiff in Error now appeals.

CONTENTIONS.

Plaintiff in Error contends:

- (1) That the judgment is against the law in this:
 - (a) Plaintiff was and is entitled to a judgment on the pleadings.
 - (b) Forfeiture is an affirmative plea and Defendant in Error relied on a forfeiture without pleading same.
 - (c) The Defendant in Error testified and admits he knew the Plaintiff in Error owned the claim in dispute as well as five other claims and that in September, 1911, he saw the annual assessment work being performed by Joseph Anderson and others and admits Plaintiff in Error did three or four hundred dol-

lars' worth of work for the claim in dispute and the five other claims. Under these facts it was incumbent upon Defendant in Error to notify Plaintiff in Error of his intention to re-locate so that Plaintiff in Error could cast off any unrepresented claim or the excessive claim or claims in the group of claims before Defendant could initiate any title to any part or portion thereof.

- (2) That the Court erred in admitting the opinion of the witness Rimmer as to the value of the work done by Plaintiff in Error in September, 1911, on the claim in dispute.
- (3) That the Court erred in denying Plaintiff in Error's motion for a new trial.

Forfeiture.

(1) **THIRD ASSIGNMENT OF ERROR.**

The Court erred in entering judgment in said cause against the plaintiff and in favor of the defendant, for the reason that said judgment is against the law.

The Defendant in Error admits the validity of our location in his answer (Tr. p. 6) and relies upon a relocation of the same placer claim without pleading a forfeiture of our title. True, he denies that the Plaintiff has performed any labor *upon* said claim since 1909, but nowhere does he ever allege that the work *or improvements* were not done *for the benefit* of the claim.

The plea of forfeiture is an odious one. The courts do not incline to the enforcement of this class of penalties, which have always been deemed in law odious.

Lindley on Mines, (Third Ed.) Vol. 2, Sec. 645;

Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439 (9 Morrison Min. Rep. 616);

Book v. Justice M. Co., 58 Fed. 106.

Forfeiture as a defense to an action must be specifically pleaded.

Lindley on Mines, (Third Ed.) Vol. 2, Sec. 643, p. 1598;

Renshaw v. Switzer, (Montana) 13 Pac. 127;

Bishop v. Baisley, (Oregon) 41 Pac. 936;

Altoona Q. M. Co. v. Integral Q. M. Co., (California) 45 Pac. 1047;

Duncan v. Eagle Rock G. M. & R. Co., (Colorado) 111 Pac. 588.

(2) FIRST ASSIGNMENT OF ERROR.

The Court erred in admitting the testimony of the witness Rimmer as to the value of the assessment work.

The Defendant in Error called Mr. John Rimmer as a witness, who testified in substance as follows:

I reside in Susitna, and have resided there about seven and one-half years. I have been working in the Yentna country mining and I am acquainted with the country around Dollar

Creek. I know Brahenburg, Bub and Anderson and have known them since 1906. I was at Falls Creek in 1911. I know the place along Dollar Creek where the Cache Creek Mining Company have started a ditch. In September, 1911, I was working about a mile or a little over from there mining. I afterwards saw the work that was done there. It was just plowing, scraping, preliminary work, about 1400 feet long. The going rate of wages in that district at that time was \$5 a day and board. I don't know what horses were worth up there.

Q. Are you familiar with the country there along Dollar Creek, that is, the character of the ground? A. Yes, sir. Q. Do you know about how much work it takes to move such dirt as was removed by the Cache Creek Mining Co. there? A. I think I do. Q. What would you say that work is worth? (By the Court). What is that work worth done the way the plaintiff says he did it, not what is it worth done some other way?

Judge LYONS. We object to it.

By the COURT. I think it is competent. The weight of it is with the jury. He may answer. The jury may take into consideration what kind of work it was and what he knows about it—the whole weight of the evidence will be with the jury; I think I will admit it.

(Plaintiff allowed an exception to the ruling of the Court.)

A. Why I think about \$150 would be a liberal allowance for that kind of work in the ditch.

On cross-examination the witness Rimmer testified in substance as follows:

I don't know how many days those horses worked up there. I could not tell what a horse is worth a day up there. I never use

horses. I use dogs altogether. I don't know how many days the horses worked there and I don't know how many horses worked there.

It was an invasion of the province of the jury and clearly error for the Court to permit the said witness Rimmer to hazard an opinion or guess of the value of the work done by Plaintiff in Error. It was for the jury to say how much the work was worth under all the evidence in the case. It was for the Court to tell the jury by instructions how to measure the value of the work.

The rules for measuring and estimating the value of annual assessment work is given by *Lindley on Mines*, Sec. 635, Vol. 2 (Third Ed.), and by the numerous cases therein cited.

“In estimating the value of the labor performed, the jury should consider the distance of the mine from the nearest point where labor can be procured, the cost of maintaining men while the labor was being performed, the current rate of wages, and any other necessary and reasonable expense which might be incurred in the performance of said labor.”

Walton v. Wild Goose M. & T. Co., 123 Fed. 209.

ASSESSMENT WORK.

We wish to call the Court's attention to the following testimony in regard to the amount and character of work done by the Plaintiff in Error as claimed by the Plaintiff in Error and as admitted by the Defendant.

TESTIMONY OF JOSEPH ANDERSON.

(Tr. p. 18.) My name is Joseph Anderson. I am a miner by occupation. I have been superintendent on the ground and manager of the Cache Creek Mining Company for the last 3 years.

(Tr. p. 22.) The Cache Creek Mining Company owns six claims on Dollar Creek. They are named Zero, Palouse, Boston, No. 1 below Discovery, and No. 1 above. The Number 1 above Discovery is the claim in dispute in this action.

Q. Did you do the assessment work on that claim in 1911? A. We did. I did, not on the claim, but by ditching above it.

Q. How did you do the assessment work for this claim in the year 1911? A. By ditching on the bench.

(Tr. p. 24.) The intake of the ditch from Number 1 above on Dollar Creek is approximately two miles. The ditch was surveyed by me in 1911. I measured the ditch. It is 1600 feet. That work was done in September, 1911. The outfit was packed up at Dollar Creek and packed over there with horses and that ditching was in about two feet wide on the bottom and 18 inches on the lower lip and considerable more in places on the upper lip, the upper side. There were 3 horses.

(Tr. p. 25.) Q. How far is it from where you took that outfit to where this ditch is situated? A. It is about five miles.

Q. How many men were in the outfit? A. Three besides myself. Their names were Victor Carlson, George Winter and Andy Thomas and Charley Nawn worked at the warehouse and camp, packing up the outfit and things like that; helped us pack the horses. I was there myself all the time. I was there the 1st, 2d, 6th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th of September.

(Tr. p. 26.) Q. What did your outfit consist of? A. It consisted of supplies to use in the cookhouse, tents, stoves and everything to feed the men, a complete camp; horses, plows, scraper and tools, picks and shovels, etc., and everything that was needed to do that kind of work.

Q. I will ask you how many claims was this work to be applied on, as assessment work? A. Six claims.

Q.. On what stream? A. Dollar Creek.

Q. Is that all the property of the Cache Creek Mining Company? A. All the property of the Cache Creek Mining Company.

(Tr. p. 27.) You say you had 3 horses? A. Three horses.

Q. How many days were they at work? A. Nine days.

(Tr. p. 30.) I will ask you as a miner if that work that you did in that ditch tended to the development of the Claim Number 1 above on Dollar Creek? A. It did.

Q. In what way? A. By bringing water from it on the bench so that it can be piped by hydraulic methods.

(Tr. p. 31.) You say this claim, Number 1 above on Dollar, is right on Dollar Creek? A. It is on Dollar Creek.

Q. And how far would the creek be from that after it is constructed through? A. It is about 1500 feet from the rim.

(Tr. p. 32.) Q. Is it your intention to finish this ditch? A. It is.

Mr. RITCHIE. You mean the company's intention?

Judge LYONS. Yes, sir.

(Tr. p. 41.) And you had a continuous ditch, about 1600 feet, where you have indicated on the map? A. That is right, as near as I can remember.

Q. How deep was the ditch? A. It was an average of 18 inches on the lower lip.

Q. And how high on the upper lip? A. There was one place it was about 8 feet, but the most of it was pretty nearly a uniform depth of two feet or so.

Q. How wide was the ditch? A. Two feet on the bottom.

Q. Isn't it that way all the way through? A. All the way through with the exception of where it dropped off here and wasn't necessary.

(Tr. p. 43.) And the prevailing wages of a man up there is, you say, \$5.00 a day? A. Yes, sir, and board.

Q. And you figure board worth \$3.00 a day? A. I did then.

Q. How do you figure that? A. The cost of freighting in there and the wages.

Q. What are provisions worth in that vicinity of Cache Creek, that is, compared with prices down here on the coast—are they worth twice as much? A. I should judge more than that.

Q. If you add the freight? A. Yes.

Q. Is the freight the equal of the cost price here on the coast? A. I don't know what the cost price is here.

Q. You are not familiar with the prices here? A. No, never bought anything here.

Q. What does it cost by the ton to freight from Seldovia up to Cache Creek, ordinary provisions? A. I don't know what the freight rate is from Seldovia to Sheep Creek, but I should say approximately \$210 or \$215 a ton.

(Tr. p. 45.) Q. How do you get at the figure of \$15 a day for the horses? What is a horse worth up there? A. I want to correct that statement; I figured it out from notes and I find it was \$13 a day.

Q. What do you feed a horse up there from June to September—don't you turn him out on the grass? A. Not when we are working him, feed him entirely grain and hay.

Q. But the horses do graze a great deal? A. When they are not working.

Q. And you figure that a horse is worth \$13 a day? A. I do.

(Tr. p. 51.) Q. All the work you did for assessment work on those claims, to hold those claims, was this work you did on the ditch? A. It was.

Q. And you figured that as worth \$600? A. I did.

(Tr. p. 103.) Q. What was the cost of that work—to build that ditch? A. My figures when I stopped working on there was \$618, I think.

Q. In estimating that cost, did you charge anything for the tools used there? A. I did not.

Q. Did you charge anything for any other equipment there? A. No equipment whatever—charged nothing for breaking of hammers or tools or anything of that kind.

TESTIMONY OF DEFENDANT HENRY BRAHENBURG.

(Tr. p. 66.) My name is Henry Brahenburg, I am the defendant in this action.

(Tr. p. 67.) I know Joseph Anderson. He was the manager of the Cache Creek Mining Company and had charge of all their work in 1911.

Q. You knew that fact? A. Yes, sir.

(Tr. p. 69.) Q. Now, did you see that work from time to time when it was being done? A. I would see it every day, yes. We were above timber line and everything was in plain sight.

Q. How high is that country around there, about what is the elevation? A. Three thousand or something like that, I guess; close to three thousand.

Q. Did you see the work when they finished it? A. Yes.

Q. How many men did you see working there? You say they were there every day, in 1911? A. There was two besides Anderson himself on the work.

Q. Who were those two men? A. George Winter and Victor Carlson.

Q. Did you know Andy Thomas? A. Yes.

Q. What did Andy Thomas do, if you saw him do anything? A. I didn't happen to see him; they were a mile or a mile and a half on Falls Creek; they had their camp over there.

Q. You saw the work when it was finished. Describe what that work was like when they quit and pulled off their men and horses. A. As near as I can describe it, it was just——

Q. Go to the plat and indicate to the jury the nature of the work and the length of it as you remember it. A. Well, there was about fourteen or fifteen hundred feet here; as near as I can describe it, it was just plowed out, no part of it looked like a ditch, no part of it would carry water, and it would cost more to complete it than they had already done. Half of it ain't plowed out and the other half I don't think would average more than six or ten inches; there is places where it is two feet deep, that is holes.

Q. What would you say was the average depth of the digging in that ditch? A. Six or eight or ten inches.

Q. And the average width? A. Well, two feet; something like that, I guess.

(Tr. p. 79.) Q. Did you see George Winters there in September, 1911? A. He was

working for the Cache Creek Mining Co. at that time and afterwards went to work for us.

Q. He was working for the Cache Creek Mining Co.? A. At that time, yes, 1911.

Q. What was he doing? A. He was driving the team.

Q. What was the team doing? A. Plowing furrows in that ditch.

Q. Do you know Victor Carlson? A. Yes, sir.

Q. What was he doing? A. I believe he was holding the scraper the best part of the time, and holding the plow when they were plowing.

(Tr. p. 80.) Do you know Andy Thomas? A. Yes, sir.

Q. Was he working there at that time? A. I believe he was doing their cooking over on Falls Creek.

(Tr. p. 82.) Q. Did you ever work for the Cache Creek Mining Co.? A. Yes, sir.

Q. When? A. The spring of 1910 the first time, and the spring of 1911 I worked for them. I worked five or six months for them altogether, something like that. I guess all told. The first time I quit was along in the middle of the summer of 1910, the first day of July, I believe it was; the other time I quit, I think it was getting along the first of June, in the spring of 1911, I believe. The Cache Creek Mining Co. was paying a hundred dollars a month and board to its men.

(Tr. p. 83.) Q. What is board worth up there? A. We always figure about two dollars a day.

Q. How do you figure that? A. Well, the cost of grub; the cost of freighting, getting it there and that is what the general camp figures it at, at \$7 a day to the man; that is \$5 a day and allow him \$2 a day for board;

that is the general rule of the camp. We never figured it out closely, but I think that is what it cost us, what little operations we done.

TESTIMONY OF LOUIS BUB.

(Tr. p. 83.) My name is Louis Bub. I am a partner of the defendant Henry Brahenburg.

(Tr. p. 90.) Q. It is a fact that if this ditch is finished up it can be made a serviceable ditch, according to your testimony? A. There is no water to go through it.

Q. The ditch would be all right if there was water, wouldn't it? A. It is not now.

Q. I say, if there was—suppose there is water, if they finished it, it would be all right? A. Yes.

(By the COURT.) Q. Suppose they take your water? A. Then we will have to quit mining.

Q. Suppose they claim they are the owners of that water and intend to take it and you are going to have a lawsuit about it afterwards—do you think it would be serviceable, could they use it if they took your water—could they use it to take the water out of Dollar Creek that you are now using? A. Yes, sir; it is above our ditches; if they complete that ditch it will take the water out above our two ditches.

(Tr. p. 95.) Q. What would it cost to get stuff from where you were using these horses in where the work was done on the ditch? A. It wouldn't cost but very little more.

Q. It wouldn't cost but very little more? A. No, sir; we were freighting stuff in there, contracting to take stuff in there, for $7\frac{1}{4}$ cents a pound.

Q. How much is that a ton? A. You can figure it out.

Q. That is a pretty good price per ton, is it not—about \$150 a ton? A. Yes.

As water is essential to the development and working of placers, expenditures made in constructing ditches, flumes and pipe-lines, for the purpose of conducting water to the property for use on such property, will undoubtedly satisfy the law.

Lindley on Mines (Third Ed.), Vol. 2, Sec. 631, p. 1562.

It is admitted that all the claims are contiguous and owned by Plaintiff in Error and that the character of the work was beneficial to any and all of the claims.

The land department has formulated a series of deductions from the adjudicated cases as to work done outside of a group of claims for the common benefit of all the claims. These deductions and the cases are given and considered by Judge Lindley in Sec. 631, Vol. 2, Third Ed. of his valuable work on mines, but we are unable to find any ruling by either the Courts or land department or any discussion by any text writer on mineral law on the right of a claim owner to apply to one claim beneficial work done outside the claim for a group of claims where the amount of work exceeds one hundred dollars, but is claimed insufficient in amount for the entire group.

From our examination of the subject, we believe the same principles of law involved in the case of

Jones v. Wild Goose M. & T. Co., 177 Fed. 95, are involved, and the relocater before relocation should be compelled to notify the prior owner who should be given the right to elect if insufficient work was done without the group for all the claims but enough for some of them.

If five hundred dollars' worth of work was done by the agents of the owner under the belief that they had done six hundred dollars' worth of work for the claim in dispute and five more contiguous claims, why should the owner lose all the six claims? And if he caused the five hundred dollars' worth of work to be done on one of his claims for it and five contiguous claims, would it be contended he would lose all six claims?

It is impossible to read the record in this case and escape the conclusion that the verdict was contrary to the evidence and the court should have granted Plaintiff in Error's motion for a new trial.

The facts charged as the ground for the forfeiture must be established by clear and convincing proof.

Justice Min. Co. v. Barclay, 82 Fed. 554;

Hammer v. Garfield M. & M. Co., 130 U. S. 291;

McCulloch v. Murphy, 125 Fed. 147.

The evidence shows the Plaintiff in Error in good faith paid and spent \$618.00 on its six claims; that said claims were located in the interior valley of Alaska over one hundred miles from the coast;

that it costs from \$150 to \$215 per ton for transporting supplies to the claims from the coast; that it is undisputed the work done was beneficial work; that our title was not disputed and even the good intentions and good faith of the Plaintiff in Error were unassailed.

Under these conditions we submit in conclusion the Court should reverse this case and relieve the Plaintiff in Error from such an obnoxious judgment.

Respectfully submitted,

JOHN LYONS,

JAMES E. FENTON,

WILLIAM A. GILMORE,

Attorneys for Plaintiff in Error.

No. 2387

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CACHE CREEK MINING COMPANY
(a corporation),

Plaintiff in Error,

VS.

HENRY BRAHENBERG,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

In the trial court plaintiff in error was plaintiff and defendant in error was defendant. For convenience they will be referred to in this brief as plaintiff and defendant respectively.

This action seeks to determine the possessory title to a placer mining claim known as Number One Above Discovery, on Dollar creek, Yentna mining district, Alaska, and is in reality an action of ejectment, although plaintiff asked equitable relief by way of injunction, and defendant prayed that he be decreed to be owner of the claim, subject

to the paramount title of the United States. Plaintiff's brief inaccurately states that defendant's answer "admits the validity of plaintiff in error's title," in language thereafter quoted. The quotation shows that defendant, while admitting that plaintiff's grantor had once owned the claim and had conveyed whatever interest he held to plaintiff, expressly denied that plaintiff had any title to the claim, alleging that it had forfeited all its right thereto by failure to perform annual labor long prior to defendant's relocation of the same.

Defendant then set up his own location of the disputed claim and on a trial of the issues a jury returned a verdict in his favor, upon which judgment was entered. Plaintiff then sued out this writ of error.

Argument.

It is admitted that the only issue in the case was the question whether plaintiff had performed the annual labor required by law on or for the benefit of the claim in the year 1911, and the court so instructed the jury (R. 119). Plaintiff's claim of labor was that it had done work to the value of \$618 on a water ditch intended to carry water to a group of six claims, including the claim in dispute. The defendant offered some evidence tending to show that the ditch would be of little value, if completed, because all the water in the creek proposed to be tapped had already been appropriated

by defendant except at occasional short periods of high water, and that the work had no real permanent value because of the defective manner in which it was done, but the main issue was as to the value or reasonable cost of the work, defendant's witnesses testifying that the value and cost of the work fell far short of the \$600 necessary to hold the group of six claims.

Though plaintiff seeks to set up several assignments of error it appears to defendant that there are really only two issues arising on this appeal. First: Did the trial judge commit any substantial error in his rulings or instructions? Second: Was the evidence on the whole sufficient to justify the verdict? It was admitted that plaintiff or its grantor once owned the claim, and it was not disputed that defendant's relocation in 1912 was valid if the ground had reverted to the public domain through plaintiff's failure to do annual labor. Though defendant pleaded that plaintiff had done no assessment work since 1909 the testimony was confined to the year 1911. The jury's verdict for the defendant was a finding that plaintiff failed to do the required annual labor in 1911, and this verdict was returned under an express instruction of the court that defendant must prove that fact by a preponderance of testimony. We quote from the instructions (R. 119):

"If you believe that it has been established by a preponderance of the evidence in this case that the plaintiff did not in the year 1911 do one hundred dollars worth of work on said

claim, or to develop said claim—the work need not be done right on the claim, if it was done to develop the claim—then on the 31st day of December, 1911, the claim became forfeited and open to relocation by any one else.

“The defendants in this case claim and have offered evidence to prove that they relocated the claim according to law and there has been no evidence to the contrary, but this is not all they have to prove—they have to prove to you by a preponderance of the evidence that one hundred dollars worth of work was not done by the plaintiff in the year 1911.

“In other words, having admitted that the plaintiff had a good and indefeasible title and claiming as they do—that is, the defendants claiming as they do—that that title has been forfeited by the failure to perform assessment work, the burden is upon them to prove to you that the assessment work has not been done.”

The instructions, in the opinion of defendant, were as strongly in favor of plaintiff as they could be made under the law. Plaintiff's counsel took no exception to any of them. Defendant excepted to the instruction that the burden was upon defendant to prove by a preponderance of evidence that plaintiff did not do the required assessment work in 1911 (R. 122). This exception is of no importance since defendant is not appealing, except as showing that at the time the only objection to the instructions came from the party who afterward received the verdict.

The instruction quoted was based upon the law as laid down by this court in *Thatcher v. Brown*, 190 Fed. 708, construing the Act of Congress of

March 2, 1907, governing annual labor on mining claims in Alaska. In that decision it was held that the requirement of \$100 worth of work on or for the benefit of a mining claim must be done "during the year", and that failure to do the whole amount of work required within the year entails a forfeiture by operation of law at the expiration of the year. The language of the act is:

"Such claim shall become forfeited and open to relocation by others as if no location of the same had ever been made."

It was under the law of 1907, so construed by this court, that defendant located the disputed claim, "as if no location of the same had ever been made", and the jury, fairly and fully instructed by the court on the law of the case, found that the facts made his location good.

In this case the ordinary rules of forfeiture do not apply. A forfeiture can scarcely be said to be odious when it results from failure to comply with an explicit requirement of law with no chance of recovery or reinstatement such as is contained in the general mining law of 1872. Yet defendant can go further and safely say that the authorities cited by plaintiff's counsel do not strengthen its case. In their "Contentions" counsel urge that plaintiff was and is entitled to a judgment on the pleadings. Since no motion for such a judgment was made in the trial court it is difficult to see how the court could have entered such a judgment, and it is somewhat late for plaintiff to ask for such judgment

on appeal. The pleadings were certainly broad enough to permit the admission of testimony, and if defendant's answer and cross-complaint were formally defective the defect was cured by the verdict as the record stands.

Plaintiff's counsel also urge that forfeiture is an affirmative plea and that defendant relied on a forfeiture without pleading the same. To sustain this contention they call attention to the averment in defendant's answer that plaintiff had done no work "on the claim since 1909". Since work done for the benefit of a claim is held to be constructively on the claim whether actually on the claim or not the averment in the pleading covers everything the law contemplates, and if not as explicit as painful accuracy might demand was broad enough to be made complete by the verdict.

The general mining law of 1872 requires labor or improvements annually "on each claim", and that "where claims are held in common such expenditure may be made upon any one claim". Yet the courts have uniformly held from the beginning that "on" or "upon" a claim meant for the development of the claim and might be done outside its boundaries. That being the construction of "on" and "upon" in the act the same construction is to be placed upon those terms in a pleading which involves the mining law.

Examination of the authorities cited by plaintiff on the question of pleading a forfeiture shows that they do not fit the argument. In *Duncan v. Eagle*

Rock Co. 111 p. 588, the Colorado supreme court held that a forfeiture may be proven under a general denial (p. 594). Further that a claimant must himself show that he performed the annual labor for at least the preceding year. In *Bishop v. Baisley*, 41 p. 936, the Oregon supreme court held that after pleading facts it is unnecessary to say that thereby the claim was forfeited''. The opinion further says:

“Under our practice technical forms of pleading are abolished and it is now only necessary to set forth the facts constituting the cause of action or defense, concisely, without unnecessary repetition. Not having been tested by demurrer, the allegations of forfeiture are sufficient after trial.” (p. 938.)

Lindley on Mines, Vol. 2, sec. 645, cited by plaintiff, contains the following:

“While it is often said that a forfeiture can be shown only upon clear and convincing evidence, the proof is made as required whenever it is shown by a preponderance of the evidence that the full amount of annual labor or improvements was not made or expended within a given year.”

Hammer v. Garfield M. & M. Co., 130 U. S. 291, is cited by plaintiff on the question of forfeiture. It is a case often cited, but all the court decided on the question of forfeiture was that the proof must be clear, and that in the particular instance the evidence of the defendant “was meager and unsatisfactory and was completely overborne by the evi-

dence of the plaintiff". The jury had found for the plaintiff on the facts.

Certainly the finding of the jury in the case at bar, upheld by the trial judge in denying the motion for a new trial, ought to be conclusive on the facts, unless plainly against the weight of evidence. Casual perusal of the testimony, defendant confidently asserts, will convince any unbiased mind that the preponderance of testimony was in favor of defendant, as the jury found.

Plaintiff insists that the court erred in allowing the witness Rimmer to testify that the value of the work done did not exceed \$150 in value for six claims. Plaintiff's brief quotes Rimmer's testimony, showing that he was familiar with the ditch work claimed by plaintiff for annual labor in 1911; that he was working close by while the work was in progress, and had seen it frequently after it was done; that he was familiar with the going wages and cost of living on the creek and in the district generally. Yet plaintiff complains that Rimmer was permitted by the court "to hazard an opinion or guess of the value of the work done by plaintiff".

On the question of the cost and value of assessment work plaintiff cites *Walton v. Wild Goose Co.*, 123 Fed. 209. On page 216 of the opinion the following is found:

"The qualification of any witness to express an opinion should always be made to appear to the satisfaction of the court. Opinion evidence,

like expert testimony, is of but little, if any, value unless connected with a full statement of the facts within his own knowledge."

Witness Rimmer showed a very considerable knowledge of all the attendant facts. A residence of seven years in a mining district ought to have given him a fairly accurate knowledge of conditions.

Counsel cite Lindley, sec. 635, Vol. 2, on the question of estimating the value of assessment work. The same section contains the following, the first paragraph being quoted from the Montana supreme court:

"In determining the amount of work done upon a claim, or improvements placed thereon for the purpose of representation, the test is as to the reasonable value of the said work or improvements, not what was paid for it, or what the contract price was, but it depends entirely upon whether or not the said work or improvements were reasonably worth the said sum of one hundred dollars."

"A mere expenditure is not of itself sufficient. The work must tend to develop the claim, and be of the reasonable value claimed."

In *McCulloch v. Murphy*, 125 Fed. 147, cited by plaintiff, the following is found:

"One of the main tests of determining this question is not what was paid for it, or the contract price, but whether or not the labor, work and improvements were reasonably worth the said sum of one hundred dollars."

Defendant reiterates that the verdict of the jury and the denial of plaintiff's motion for a new trial

disposes of the one issue of fact in the case—whether or not plaintiff did sufficient assessment work on in the year 1911, but to make it clear to this court that the evidence was ample to support the verdict will quote briefly from the record.

At the outset defendant urges that there is no merit in plaintiff's contention that before relocating the claim "it was incumbent upon defendant to notify plaintiff of his intention to relocate so that plaintiff could cast off any unrepresented claim or the excessive claim or claims in the group of claims before defendant could initiate any title to any part or portion thereof". No statute makes any such requirement, and the act of 1907 gives a claimant opportunity to show good faith by recording proof of labor. On page 22 of the record it appears that counsel for plaintiff on the trial stated that he had in the courtroom such affidavits. Counsel for defendant stated that they were not in the form required by law, and no offer to introduce them was made.

Joseph Anderson, manager of the plaintiff corporation, and its chief witness on the trial, testified that the ditch work claimed as annual labor for 1911 was done for the group of six claims on Dollar Creek (R. 22-3-4-5-6). Three of these were association claims (see map, plaintiff's Exhibit A). Mr. Anderson testified (R. 26):

"Q. I will ask you how many claims was this work to be applied on, as assessment work?

A. Six claims."

Much other testimony of Anderson is given in plaintiff's brief. He stated positively that he did \$618 worth of work, according to his method of computation, for six claims; that he claimed \$267 for men and their board and \$351 for horses and their keep (R. 105-6-7).

It is not correct, as counsel say in their brief, that defendant admits that plaintiff did \$300 or \$400 worth of work, though counsel may be able to deduce those figures from statements made by defendant's witnesses as to wages and cost of living. Louis Bub, defendant's partner, testified (R. 92), that he and defendant had built a ditch practically parallel to the one plaintiff started, and completed it, 3000 feet long, for \$800. This ditch is two feet deep and four feet wide and carries water effectively. Plaintiff's "ditch" is half as long, is not complete at any place, and much of it is merely a shallow furrow (see photographic exhibits (R. 11-12-13). These photographs were taken soon after the work was done in September, 1911 (R. 71-2-3).

In order to make up the \$618 worth of work Manager Anderson put in eight days for each of four men; himself at \$150 a month, a cook at \$125 a month, and two miners at \$100 a month, and board for each of the men at \$3 a day. In making up the cost of \$3 a day per man for board he included the wages of the cook, although he also charges that as another laborer. He also charges for extra work in getting the outfit to Dollar creek

from Cache creek. That is, he charges the entire cost of getting provisions on the ground as an item and then seeks credit for \$3 a day for each man's board because of the enormous expense of getting in provisions. Then he charges \$13 a day for three horses, including the day he moved his camp outfit over, although he admitted that only two horses worked at a time. This interesting calculation appears on pages 104-5-6 of the record.

Defendant Bahrenburg testified that board in the vicinity of Dollar creek is generally estimated to be worth \$2 a day per man, this covering every item of its cost (R. 83). Bahrenburg and Bub testified without contradiction that in January, 1912, they hired from the defendant, the Cache Creek Company, seven horses, four men, and a full outfit of sleds for freighting, at \$100 a day, the company furnishing board for the men and feed for the horses (R. 78-93-94). They also testified that freighters and packers regularly charge \$10 a day for horses in the district (R. 72-87).

The testimony of defendant's witnesses as to the cost of work by men and horses, allowing plaintiff for all the time claimed, makes the work done by plaintiff much less than \$600. Further tending to reduce the value of the work is the estimates of its value already noted in the testimony of Bub and Rimmer, and the testimony of Bahrenburg that the work was practically valueless (R. 75-6). Also the testimony of Bahrenburg and Bub that while Anderson was doing the work he told them he had

orders to start the ditch for assessment work but did not know whether it would ever be used or not (R. 67-85). This was positively denied by Anderson.

It is plain that the jury took the view that the work was far short, in value, of the amount required by law, and upon that finding based their verdict, which the trial judge did not see fit to disturb.

Defendant in error respectfully submits that the judgment of the district court of Alaska is fully justified by the record.

T. C. WEST,

E. E. RITCHIE,

Attorneys for Defendant in Error.

No. 2388

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE SHIPOWNERS AND MERCHANTS' TUG-
BOAT COMPANY, a Corporation, Owner of
the Steam Tugs "DAUNTLESS" and "HER-
CULES,"

Appellant,

vs.

HAMMOND LUMBER COMPANY, a Corporation,
Appellee.

In the Matter of the Petition of the SHIPOWNERS
AND MERCHANTS' TUGBOAT COM-
PANY, a Corporation, Owner of the Steam
Tugs "DAUNTLESS" and "HERCULES,"
for Limitation of Liability.

Apostles.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

FILED

APR 16 1914

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of THE SHIPOWN-
ERS & MERCHANTS' TUGBOAT COM-
PANY, a Corporation, Owner of the Steam
Tugs "DAUNTLESS" and "HERCULES,"
for Limitation of Liability.

Praeceptum for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore perfected in this court, and included in said transcript the following pleadings, proceedings and papers on file, to wit:

(1) All those papers required by section I of paragraph I of Rule 4 of the Rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit, excluding the testimony taken on the reference to ascertain value.

(2) All pleadings, motion, claims and answers, and the exhibits annexed thereto. [1*]

(3) The monition and all proceedings taken, made and returned by the United States Marshal to this Court.

(4) The opinion of the Court.

(5) The final decree and notice of appeal.

*Page-number appearing at foot of page of original certified Record.

2 *The Shipowners & Merchants' Tugboat Co.*

(6) The assignment of errors.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Petitioner and Appellant.

[Endorsed]: Filed Mar. 12, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*In the District Court of the United States in and for
the Northern District of California, First Divi-
sion.*

No. 15,234.

In the Matter of the Petition of THE SHIPOWN-
ERS & MERCHANTS' TUGBOAT COM-
PANY, a Corporation, Owner of the Steam
Tugs "DAUNTLESS" and "HERCULES,"
for Limitation of Liability.

Statement of Clerk U. S. District Court.

PARTIES.

PETITIONERS: Shipowners and Merchants' Tug-
boat Company, a corporation, owners of the tugs
"Dauntless" and "Hercules," etc.

CLAIMANTS: The Hammond Lumber Company, a
corporation, claimants of raft of piling. [3]

PROCTORS

for

PETITIONERS: Messrs. Page, McCutchen, Knight
and Olney and Ira A. Campbell, Esquire, San
Francisco, California.

CLAIMANTS: W. S. Burnett, Esquire, and Messrs.
Denman and Arnold, San Francisco, California.

PROCEEDINGS.

1912.

- February 27. Filed verified Petition for Limitation of Liability. Filed Order referring cause to James P. Brown, United States Commissioner for the Northern District of California, at San Francisco, for the purpose of making appraisement of the value of the interest of said petitioner in the steam tugs, etc.
- March 23. Filed Report of United States Commissioner James P. Brown, as per order of February 27, 1912, as to appraised value of interest of petitioners in steam tugs, etc.
- March 29. Filed Order confirming the Report of James P. Brown, United States Commissioner, as to value of interest of petitioners in steam tugs, etc., and ordering petitioners to file bonds accordingly.
- March 30. Filed order restraining all other suits growing out of this matter. [4]
- March 30. Filed Stipulation (Bond) to cover value of Tug "Hercules," in the sum of \$70,000, with the American Surety Company of New York, as Surety.
- March 30. Filed Stipulation (Bond) to cover value of Tug "Dauntless," in the

1912.

sum of \$45,000, with the American Surety Company of New York, as Surety.

- April 2. Issued Monition, citing all persons claiming damages, etc., to appear before said Court and make due proof of their respective claims before James P. Brown, United States Commissioner, at San Francisco, California.

On a later date the United States Marshal made a return on the Original Monition as follows:

“United States of America,
Northern District of California.

San Francisco, April 13, 1912.

I hereby certify and return that I served the annexed Monition on the Hammond Lumber Company, a corporation, 260 California Street, San Francisco, by handing to and leaving an attested copy thereof with W. S. Burnett, who is the Vice-president of the Hammond Lumber Company of New Jersey, personally on the 2d day of April, A. D. 1912.

I further return that at the request of Messrs. Page, McCutchen, Knight and Olney, the proctors for the petitioners herein, [5] I

1912.

posted a certified copy of the annexed Monition in the following public places in the City of San Francisco, to wit, one at the Hall of Justice at Kearny and Washington Streets, one at the City Hall, located on the south side of Market Street, between Eighth and Ninth Streets, and one at the United States Postoffice and Courthouse Building at Seventh and Mission Streets.

C. T. ELLIOTT,

U. S. Marshal.

By M. J. Fitzgerald,

Office Deputy."

And on July 12th, 1912, the United States Marshal as aforesaid filed a Supplemental Return, which was in part the same as the previous return and further that he, the said Marshal, had caused to be published in the "Recorder," a newspaper of general circulation, printed and published daily (Sundays and legal holidays excepted), a copy of said Monition once a week from the fourth day of April, 1912, to and including the 9th day of July, 1912. Said Supplemental Return was signed "C. T. Elliott, U. S. Mar-

1912.

shal. By M. J. Fitzgerald, Office Deputy." (See transcript for full Supplemental Return.)

July 11. Filed United States Commissioner's Report on Claims.

12. Filed Interlocutory Decree.

Filed Order Allowing Petitioners to Amend their Original Petition, for Limitation of Liability.

Filed Amended Petition for Limitation of Liability. [6]

July 30. Filed Claim of the Hammond Lumber Company, a corporation, to the raft of piling, etc.

30. Filed Answer of the Hammond Lumber Company, a corporation, to the Petition for Limitation of Liability.

30. Filed Exceptions of the Hammond Lumber Company, a corporation, to the Petition for Limitation of Liability.

September 27. Filed Objections and Answer of Petitioners to Claim of the Hammond Lumber Company, a corporation.

October 23. Filed Notice of Motion of Hammond Lumber Company, a corporation, for Dismissal of Petition for Limitation.

1913.

December 13. A hearing was this day had before the District Court of the United States for the Northern District of California, First Division, at the Courtroom thereof, in the City and County of San Francisco, before the Honorable M. T. Dooling, Judge, and after argument of the respective parties, the Court ordered that the Motion of Hammond Lumber Company to dismiss the Petition for Limitation of Liability stand submitted to the Court for decision.

1914.

January 10. Filed Opinion Granting Motion to Dismiss, etc.

13. Filed Final Decree.

February 5. Filed Notice of Appeal.

March 20. Filed Assignment of Errors. [7]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. —.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Petition for Limitation of Liability.

To the Hon. JOHN J. DE HAVEN, Judge of the
United States District Court for the Northern
District of California, Sitting in Admiralty:

The petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, for limitation of liability, civil and maritime, respectfully shows:

I.

That petitioner herein, The Shipowners and Merchants' Tugboat Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and maintains its principal place of business in the City and County of San Francisco, said State.

II.

That it now is, and was during all the times hereinafter mentioned, the owner of the steam tugs [8] "Dauntless" and "Hercules," together with their engines, boilers, boats, tackle, apparel, furniture and appurtenances.

III.

That said steam tug "Dauntless" is an American vessel of 144.24 net tons burden, and duly enrolled according to law in the office of the United States Collector of Customs for the District of San Francisco, State of California, and said vessel is now in the port of San Francisco, in the Northern District of California, and within the jurisdiction of this Honorable Court.

IV.

That said steam tug "Hercules" is an American vessel of 221.49 net tons burden, and duly enrolled

according to law in the office of the United States Collector of Customs for the District of San Francisco, State of California, and said vessel is now in the port of San Francisco, in the Northern District of California, and within the jurisdiction of this Honorable Court.

V.

That heretofore, on the 9th day of September, 1911, the Hammond Lumber Company delivered a large raft of piling to the master of the petitioner's tug "Dauntless" at Astoria, Oregon, to be towed to the port of San Francisco, California; that said tug made fast to said raft by means of a long steel towing hawser, attached to the towing machine on said tug, and fastened to said raft by means of a long [9] heavy chain attached to said raft by the employees of said Hammond Lumber Company constructing said raft; that the master of said tug "Dauntless" was unable to procure the services of a bar tug to assist him with said raft out of the Columbia River and across the bar at the entrance thereof, and thereupon said master called to his assistance the tug "Hercules," which made fast to said tug "Dauntless" by means of a long steel towing hawser attached to the towing machine on said "Hercules" and to the forward bitts of said tug "Dauntless."

That upon said tugs being made fast to said raft as aforesaid, they proceeded with said raft down the river from Astoria, and continued during the afternoon through the channel at the entrance of said river toward the open sea; that at the time said tugs started upon said tow, the weather, sea and tidal con-

ditions were favorable to a successful towing of said raft across the bar; that in making said tow of *said kept* in the usual channel down said river taken by vessels proceeding to sea, passing the usual and a safe distance off and to the northward of the buoys marking the southerly side of said channel at the entrance of said river; that as it reached channel buoy No. 4, said raft stuck, and said tugs were unable to make any headway with it; that at about the time said raft so stuck, the tide began to ebb strong [10] and the sea at the entrance began to make, until a tremendous sea was running in across the bar and up the entrance against the increasing ebb tide; that by reason of said sea and tide, said raft became unmanageable, and, despite every effort of said tugs, said raft was gradually turned and swept broadside against said sea until the after end of said raft tailed off towards the breakers on Peacock Spit; that said tugs continued pulling upon said raft until after it passed the black bouy marking the northerly side of said channel off Peacock Spit, when suddenly and without warning said raft pulled the towing hawser off the towing machine on the tug "Dauntless," and upon so being freed, drifted into the breakers on Peacock Spit, and became a total loss.

VI.

That after the loss of said raft, said tugs returned to the port of Astoria, and said tug "Dauntless" thereafter, on the 12th day of September, 1911, arrived at the port of San Francisco, from whence she had sailed to tow said raft from said port of Astoria to said port of San Francisco, and said tugs are now

in the same condition as they were at the close of their aforesaid respective voyages.

VII.

That said tugs “Dauntless” and “Hercules” were, and are, used and employed by petitioner herein in the business of towing between ports and places on the Pacific Coast of North America, and the sounds, bays [11] and rivers thereof, and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court, and during all of said times were good, staunch, able and seaworthy vessels, and were at all times fully and properly manned, officered, equipped, supplied and appareled, and well and sufficiently fitted and supplied with suitable boilers, machinery, towing machines, lines, hawsers, boats, tackle, apparel, appliances and store, all in good order and condition and sufficient for the business and voyages in which they are engaged, and particularly for towing said raft of piling as aforesaid.

VIII.

That the loss of said raft of piling, and all other damages and injuries, whether of persons or of property, done, occasioned and incurred upon the voyage of said tug “Dauntless,” or the said tug “Hercules,” were done, occasioned and incurred without the consent, or privity, or knowledge, or design, or neglect of the petitioner herein, or of any of its directors, or officers, or servants, or of either of said tugs.

IX.

That said Hammond Lumber Company, a New Jersey corporation, maintaining an office at No. 260 California Street, San Francisco, California, has hereto-

fore commenced in the Circuit Court for Clatsop County, State of Oregon, an action against petitioner herein, wherein recovery is sought for the alleged value of said raft and its equipment. [12]

X.

That your petitioner desires to contest its liability and the liabilities of each of said tugs "Dauntless" and "Hercules" for the injuries, losses and damages, whether to persons or to property, caused, occasioned or incurred upon said voyages, and particularly the loss of said raft of piling, and also hereby claims the benefit of limitation of liability of your petitioner provided for in sections 4282 to 4289, inclusive, of the Revised Statutes of the United States, and also hereby claims the benefit of limitation of liability of your petitioner provided for in the act of June 26, 1884, and particularly the benefit of the provisions of section 18 of said act (23 St. L. 57), and also hereby claims the benefit of limitation of liability provided for in section 4289 of the Revised Statutes of the United States as amended by the act of June 19, 1886 (24 St. L. 79), and particularly section 4 of the last mentioned act, and also hereby claims the benefit of any and all acts of the Congress of the United States, if any, amendatory of the several sections and acts aforesaid, or any thereof; and your petitioner is now ready, able and willing, and hereby offers to give its stipulation or stipulations, with sufficient sureties, conditioned for the payment into this Court by your petitioner of the value of said tug "Dauntless," and "Hercules," if required, as they and each of them were immediately after the termin-

ation of said voyages upon which said raft was lost, with interest [13] thereon, together with their and each of their freight pending, if any were pending, though your petitioner respectfully represents that none was pending, such payment to be made whenever the same shall be ordered herein; except that your petitioner respectfully offers to give its said stipulation for the payment into this court of the value of said tug "Hercules" and her freight, if any, pending, under protest, for the reason that if there is any liability on the part of your petitioner for the loss of said raft, it is solely because of the breaking away of said raft from said tug "Dauntless" and was not because of, or contributed to by, any act or thing done, occasioned or incurred by said tug "Hercules," or any of its officers or crew, and because the loss of said raft was not participated in by said tug.

XI.

While not in any way admitting your petitioner is under any liability for the losses and damages occurring as aforesaid, and your petitioner here claiming and reserving the right to contest in this court any liability therefor, either personally, or of said tugs "Dauntless" and "Hercules," or either of them, your petitioner claims and is entitled to have limited its liability, if any, in the premises, to the amount or value of its interest, as aforesaid, in the said tug "Dauntless," as it was at the close of said voyage, or if not in said tug "Dauntless" [14] alone, then in said tugs "Dauntless" and "Hercules" as they were at the close of their respective voyages.

WHEREFORE your petitioner prays that this Court will order due appraisement to be had of the value of the said tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances as the same were immediately after the close of their aforesaid respective voyages, and order and cause due appraisement to be had of the amount of the freight pending, if any, at the close of said voyages, and that stipulation or undertaking may be given by your petitioner, with sureties, conditioned for the payment into court of such appraised value whenever the same shall be ordered, and that this court will, upon the filing of such stipulation by your petitioner, issue or cause to be issued a monition against the Hammond Lumber Company and all other persons claiming damages of your petitioner by reason of injuries to persons or to property occurring or arising upon said voyages or resulting from the loss of said raft, citing them, and each of them, to appear before this court and there make due proof of their respective claims, at a time to be therein named, as to all of which claims your petitioner will contest its liability, and the liability of said tugs "Dauntless" and "Hercules," and particularly the liability of said tug "Hercules" [15] independently of the limitation of its liability claimed under the statutes and sections above stated.

That this Court may be pleased to determine that no liability exists on the part of your petitioner or of said tug "Hercules" for any act or thing done or occasioned by said tug upon said voyage upon which said raft was lost, and particularly that no lia-

bility exists on the part of your petitioner, or said tug "Hercules" for the loss of said raft, and that this Court may be pleased to release the stipulation for the value of said tug "Hercules" and her freight, if any, pending, for the reason that said tug, nor her officers, or crew did not participate in the loss of said raft.

That in case it shall be found that any liability exists upon the part of your petitioner by reason of injuries to persons, or loss of, or damage to property, done, occasioned or incurred upon said voyages, and particularly the loss of said raft, as aforesaid (which your petitioner denies and prays may be contested in this court), then that such liability shall in no event be permitted by this Court to exceed the value of said tug "Dauntless" and her freight, if any, pending; or if this Court should find that liability exists on the part of said tug "Hercules," or of your petitioner, for any act or neglect of said tug, her officers or crew, that such liability shall in no event be permitted to exceed the value of said tug "Dauntless" and "Hercules," and their freights, if any, pending [16] at the close of their respective voyages upon which said raft was lost, as aforesaid, and as such values may be determined by the appraisement of such interests as hereinbefore prayed; and that the moneys secured to be paid into court as aforesaid shall and may, after payment of costs and expenses therefrom, be divided *pro rata* among the several claimants, in proportion to the amounts of their respective claims, as by this Court adjudged; and that in the meantime, and until final judgment of this

Court shall be rendered and entered herein, this Court shall enter an order herein restraining said Hammond Lumber Company, their agents and attorneys, from further prosecuting said suit heretofore commenced in the Circuit Court of Clatsop County, State of Oregon, and restraining said Hammond Lumber Company and all other persons from prosecuting any suits against your petitioner or said tugs, or either of them, save in this court, only, in respect of the loss of said raft, and any and all claims arising upon said voyages, as aforesaid; and that your petitioner may have and receive such other and further relief, in the premises, as shall be deemed meet and equitable.

PAGE, McCUTCHEN, KNIGHT & OLNEY,

Proctors for Petitioner.

SHIPOWNERS AND MERCHANTS' TUG-
BOAT COMPANY.

By W. J. GRAY,

Vice-president. [17]

United States of America,

State of California,

City and County of San Francisco.

W. J. Gray, being first duly sworn, deposes and says: *The* he is the vice-president of the petitioner herein, the Shipowners & Merchants' Tugboat Company, a corporation, and as such vice-president, is authorized to make, verify and file the petition herein on behalf of said company; that he has read the foregoing petition, knows the contents thereof and that the allegations of the same are, and each thereof is, to the best of his knowledge, information

and belief, true as stated therein and set forth.

W. J. GRAY.

Subscribed and sworn to before me this 27th day of February, 1912.

[Seal]

M. T. SCOTT,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Feb. 27, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [18]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Order to Amend Petition.

ON MOTION of Ira A. Campbell, for petition herein, this day made in open court:

IT IS HEREBY ORDERED that the petition for limitation of liability filed herein may be amended by adding after the word "for" in the 27th line on the 5th page of said petition the following words and figures:

"the sum of \$71,249.90, said sum being."

ENTERED this 12th day of July, 1912.

JOHN J. DE HAVEN,

Judge.

[Endorsed]: Filed Jul. 12, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [19]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Amendment to Petition for Limitation of Liability.

To the Honorable JOHN J. DE HAVEN, Judge of the United States District Court, for the Northern District of California, First Division.

Now comes the Shipowners & Merchants' Tugboat Company, a corporation, petitioner herein, and amends its petition for limitation of liability filed herein by adding after the word "for" in the 27th line on the 5th page of said petition the following words and figures:

"the sum of \$71,249.90, said sum being."

SHIPOWNERS & MERCHANTS' TUG-
BOAT COMPANY,

By W. J. GRAY,
Vice-president,
Petitioner.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Proctors for Petitioner. [20]

City and County of San Francisco,
State of California,—ss.

W. J. Gray, being first duly sworn, deposes and says: That he is the vice-president of the petitioner

herein, Shipowners & Merchants' Tugboat Company, and as such vice-president is authorized to make, verify and file the foregoing amendment to the petition herein on behalf of said company; that he has read the foregoing amendment to said petition, knows the contents thereof, and that the allegations of the same are, to the best of his knowledge, information and belief, true as stated therein and set forth.

W. J. GRAY.

Subscribed and sworn to before me this 12th day of July, 1912.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 12, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [21]

[Order Referring Matter to Commissioner for Appraisement.]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of the SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

It appearing to this Court that a petition for limitation of liability has heretofore been filed herein

by the above-named petitioner, and application having been made in open court for an order appointing appraisers to appraise the value of the steam tugs "Dauntless" and "Hercules," their engines, boilers, boats, tackle, apparel, furniture and appurtenances, together with their freight pending at the close of their respective voyages mentioned in said petition for limitation of liability; and,

Good cause therefor being shown, IT IS HEREBY ORDERED that the above-entitled matter be and the same is hereby referred to the Hon. James P. Brown, U. S. Commissioner, for the purpose of making due appraisement of the value of the interest of said petition in the steam tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, furniture and appurtenances, as the same existed at the [22] close of their respective voyages upon which the raft, mentioned in said petition, was lost, together with the amount of their freight pending, if any existed; and upon the making of said appraisement that the same be forthwith reported to this court; and,

BE IT FURTHER ORDERED that at least one day's notice of the time and place of making said appraisement be given said Hammond Lumber Company, at its office, No. 260 California Street, City of San Francisco, State of California.

Entered this 27th day of February, 1912.

JOHN J. DE HAVEN,

Judge.

[Endorsed]: Filed Feb. 27, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [23]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of THE SHIPOWN-
ERS & MERCHANTS' TUGBOAT COM-
PANY, a Corporation, Owner of the Steam
Tugs "DAUNTLESS" and "HERCULES,"
for Limitation of Liability.

Notice of Appraisement.

To the Hammond Lumber Company, No. 260 Cali-
fornia Street, San Francisco, California.

You are hereby notified that the undersigned, the
duly appointed Commissioner to appraise the value
of the Steam Tugs "Dauntless" and "Hercules,"
their engines, boilers, boats, tackle, apparel, furni-
ture and appurtenances, together with their freight
pending at the close of those certain voyages men-
tioned in the petition for limitation of liability, filed
herein, will make said appraisement at the office of
the Clerk of the District Court of the United States
for the Northern District of California, in the post-
office Building, City of San Francisco, State of Cali-
fornia, on Thursday, the 29th day of February, 1912,
at the hour of two o'clock P. M., pursuant to an order
of the above-entitled Court, entered herein, a certi-
fied copy [24] of which is attached hereto.

Dated San Francisco, California, February 27,
1912.

JAS. P. BROWN,
United States Commissioner.

[Endorsed]: Filed Feb. 27, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [25]

*In the District Court of the United States in and for
the Northern District of California.*

No. 15,234.

In the Matter of the Petition of THE SHIPOWN-
ERS & MERCHANTS' TUGBOAT COM-
PANY, a Corporation, Owner of the Steam
Tugs "DAUNTLESS" and "HERCULES,"
for Limitation of Liability.

**Report of United States Commissioner, Jas. P.
Brown (as to Appraisement).**

To the Honorable Judges of the United States Dis-
trict Court, Northern District of California:

Pursuant to an order of Court, bearing date the
27th day of February, 1912, referring the above-
entitled matter to me as United States Commis-
sioner for the purpose of making due appraisement
of the value of the interest of said petitioner in the
steam tugs "Dauntless" and "Hercules," their boil-
ers, engines, boats, tackle, apparel, furniture and ap-
purtenances, as the same existed at the close of their
respective voyages upon which the raft, mentioned
in said Petition, was lost, together with the amount
of their freight pending, if any existed; and upon
the making of said appraisement that the same be
forthwith reported to this court.

I, Jas. P. Brown, as aforesaid, do hereby report
as follows: [26]

On the 29th day of February, and on the 14th day of March, 1912, I was attended by Ira A. Campbell, Esq., of proctors for petitioner, and by W. S. Burnett, proctor for respondent, and by William J. Murray and W. J. Gray, witnesses on behalf of petitioner and A. T. Jones, a witness on behalf of respondent: That said witnesses being duly sworn did testify as hereinafter set forth in the transcript of testimony hereto annexed.

That after a careful consideration of said testimony, I find:

That petitioner herein is the sole owner of said vessels "Dauntless" and "Hercules." I further find the value of the "Dauntless" at the close of the voyage mentioned in said petition was \$45,000, and the value of the "Hercules" was \$70,000.

I do further find that there was no freight pending on account of either of said vessels at the close of their respective voyages mentioned in the petition herein.

All of which is respectfully submitted.

Dated March 22d, 1912.

[Seal]

JAS. P. BROWN,

United States Commissioner for the Northern District of California, at San Francisco.

[Endorsed]: Filed Mar. 23, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

(Attached to and as a part of depositions of William J. Murray, W. J. Gray, et al. Said depositions omitted as per instructions of appellants.) [27]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

In the Matter of the Petition of the SHIPOWN-
ERS & MERCHANTS' TUGBOAT COM-
PANY, a Corporation, Owners of The Steam
Tugs "DAUNTLESS" and "HERCULES,"
for Limitation of Liability.

Notice of Filing Report on Appraisement.

To the Hammond Lumber Company, a Corporation,
and W. S. Burnett, Its Proctor:

PLEASE TAKE NOTICE that we have caused to
be filed in open court this 23d day of March, 1912,
the report of the Commissioner, James P. Brown, ap-
praising the value of the interest of the petitioner
herein in the steam tugs "Dauntless" and "Her-
cules," as well as the value of the freight pending,
if any, at the termination of their respective voy-
ages referred to in the petition for limitation of lia-
bility.

Dated San Francisco, California, this 23d day of
March, 1912.

PAGE, McCUTCHEN, KNIGHT & OLNEY,

Proctors for Petitioner. [28]

Service of the within Notice and receipt of a copy
is hereby admitted this 23d day of March, 1912.

W. S. BURNETT,

Proctor for Hammond Lumber Co.

[Endorsed]: Filed Mar. 26, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [29]

**[Order Affirming Report of Commissioner Appraising
Value of Tugboat.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 29th day of March, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable E. S. FARRINGTON, Judge.

#15,234.

In re Petition of THE SHIPOWNERS AND
MERCHANTS' TUGBOAT COMPANY,
Owner of the Tugboats "DAUNTLESS" and
"HERCULES," etc.

On motion of Ira Campbell, Esqr., attorney for *petition*, herein, no objection having been made, by the Court ordered that the report of the United States Commissioner herein appraising the value of the tugboats "Dauntless" and "Hercules" be, and the same is hereby affirmed. [30]

[Order Approving Report of Commissioner Appraising Value of Interest of Petitioner in Tugs, etc.]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. —.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

It appearing to this Court that the Shipowners & Merchants' Tugboat Company, a corporation, petitioner herein, filed in this court on the 27th day of February, 1912, its petition for limitation of liability, wherein, among other things, it prayed that an order be entered appraising the value of the interest of petitioner in the steam tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances as the same were immediately after the close of their respective voyages, for the losses arising upon which limitation of liability was sought, together with any freight pending; and,

It appearing that upon said 27th day of February, 1912, this Court entered an order referring the matter of said appraisement to the Hon. James P. Brown, United States Commissioner, for the purpose of making due appraisement of the value of the interest of said petition in said tugs, their boilers, engines,

boats, [31] tackle, apparel, furniture and appurtenances at the close of the aforesaid voyages, together with the amount of their freight pending, if any existed; and,

It further appearing that on said 27th day of February, 1912, due and regular notice was given by said Commissioner to the Hammond Lumber Company, at its office, 260 California Street, in the City of San Francisco, California, notifying said Hammond Lumber Company that said Commissioner would make appraisal of said tugs "Dauntless" and "Hercules," their engines, boilers, boats, tackle, apparel and appurtenances, together with their freight pending at the close of those certain voyages mentioned in the petition for limitation of liability, at the office of the Clerk of the District Court of the United States for the Northern District of California, in the Postoffice Building, City of San Francisco, State of California, on Thursday, the 29th day of February, 1912, at the hour of 2 P. M., pursuant to an order entered in the above-entitled court, a copy of which order was attached to said notice; and,

It further appearing that a hearing was had before said Commissioner at the aforesaid time and place, pursuant to said notice, at which hearing petitioner appeared by Ira A. Campbell, Esq., of the firm of Page, McCutchen, Knight & Olney, and Hammond Lumber Company appeared by W. S. Burnett, Esq., and that the testimony, taken by said Commissioner, and that thereafter said hearing was continued from time to time until the 14th day of March, 1912, on which date the taking of testimony in the matter of

said appraisement was concluded; and, [32]

It further appearing that there was filed in open court, on the 23d day of March, 1912, the report of said Commissioner, appraising the value of the interest of said petitioner in the tug "Dauntless," her engines, boilers, boats, tackle, apparel, furniture and appurtenances at the sum of Forty-five Thousand (45,000) Dollars, and the value of the interest of said petitioner in the tug "Hercules," her engines, boilers, boats, tackle, apparel, furniture and appurtenances at the sum of Seventy Thousand (70,000) Dollars, and further finding that no freight was pending at the termination of the respective voyages of said tugs mentioned in said petition; and,

It further appearing that due notice of the filing of the report of said Commissioner was given said Hammond Lumber Company, on said 23d day of March, 1912; and,

It further appearing that more than four days have elapsed, within which time, under the rules of this court, exceptions to the report of the Commissioner may be filed, and that no exceptions have been filed; and,

The Court being fully advised in the premises;

NOW, THEREFORE, it is hereby ordered that the report of the Hon. James P. Brown, United States Commissioner, heretofore filed herein on the 23d day of March, 1912, appraising the value of the interest of the Shipowners & Merchants' Tugboat Company, petitioner herein, in the steam tug "Dauntless," her boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the sum of

Forty-five Thousand (45,000) Dollars, and appraising the value of the interest of the Shipowners & Merchants' Tugboat Company, [33] petitioner herein, in the steam tugs "Hercules," her boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the sum of Seventy Thousand (70,000) Dollars, as said tugs were immediately after the close of their respective voyages, mentioned in the petition for limitation of liability, filed herein, be and the same is hereby approved; and,

Be it FURTHER ORDERED that the report of said Commissioner, heretofore filed herein on the 23d day of March, 1912, finding that there was no freight pending at the close of the respective voyages of said tugs, mentioned in the petition for limitation of liability, filed herein, be and the same is hereby approved.

And be it FURTHER ORDERED that the said petitioner file with this Court undertakings, with good and sufficient surety, in the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, with interest thereon from the 9th day of September, 1911, respectively conditioned for the payment into this court by said petitioner of the value of said tug "Dauntless" and the value of said tug "Hercules," as fixed by the report of the appraisers, heretofore filed and approved herein, whenever the same may be ordered by this Court.

Entered, this 29th day of March, 1912.

E. S. FARRINGTON,

Judge.

[Endorsed]: Filed Mar. 29, 1912. Jas. P. Brown,
Clerk. M. T. Scott, Deputy Clerk. [34]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 30th day of March, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable E. S. FARRINGTON, Judge.

#15,234.

In Re Petition of SHIPOWNERS AND MERCHANTS' TUGBOAT CO., for Limitation of Liability.

Minutes Re Restraining Order.

On motion of Ira Campbell, Esq., order restraining suits against petitioner and vessels herein signed and filed. [35]

Return on Service of Writ [(Restraining Order) and Restraining Order].

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the Restraining Order on the therein named, The Hammond Lumber Co., by handing to and leaving a true, correct and attested copy thereof with G. C. Fulton, as attorney for said Hammond Lumber Company, per-

sonally, at Astoria, Clatsop County, in said District on the 4th day of April, A. D. 1912.

LESLIE M. SCOTT,

U. S. Marshal for the District of Oregon.

By J. B. Marvin,

Deputy.

(In re Petition of The Shipowners & Merchants' Tugboat Co., a Corp., Owners of the Steam Tugs "Dauntless" & "Hercules" for Limitation of Liability.)

Service.....\$ 4.00

Travel 100 miles..... 12.00

Total.....\$16.00 [36]

In the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. —.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Restraining Order.

It appearing to this Court that the Shipowners & Merchants' Tugboat Company, a corporation, petition herein, filed in this court on the 27th day of February, 1912, its petition for limitation of liability; and,

It further appearing that, under and pursuant to an order of this Court entered in said cause, an ap-

praisement was made by the Honorable James P. Brown, United States Commissioner, appraising the value of the interest of said petition in the steam tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, as the same were immediately after the close of their respective voyages mentioned in said petition; and

It further appearing that thereafter, on the 23d day of March, 1912, the report of said Commissioner [37] was filed with this Court and the same was approved by this Court on the 29th day of March, 1912; and,

It further appearing that there has been filed with this Court, by the petitioner herein, on the 30th day of March, 1912, a stipulation with the petition herein as principal and American Surety Company as surety, approved by this court after due notice to the Hammond Lumber Company, wherein it is conditioned that the petitioner herein will pay into this court, whenever the same may be ordered either by this court or by an Appellate Court in the event that an appeal intervenes, the aforesaid appraised value of the interest of said petitioner in said tug "Dauntless," her boilers, engines, boats, tackle, apparel, furniture and appurtenances, to wit, the sum of Forty-five Thousand (45,000) Dollars, together with interest thereon from the 9th day of September, 1911; and,

It further appearing that there has been filed with

this Court, by the petitioner herein, on the 30th day of March, 1912, a stipulation with the petitioner herein as principal and American Surety Company as surety, approved by this Court after due notice to the Hammond Lumber Company, wherein it is conditioned that the petitioner herein will pay into this court, whenever the same may be ordered either by this Court or by an Appellate Court in the event that an appeal intervenes, the aforesaid appraised value of the interest of said petitioner in said tug "Hercules," her boilers, engines, boats, tackle, apparel, furniture and appurtenances, to wit, the sum of Seventy Thousand (70,000) Dollars, together with interest thereon from the 9th day of September, 1911; and, [38]

It further appearing, from the petition herein, that the Hammond Lumber Company, a New Jersey corporation maintaining an office at Number 260 California Street, San Francisco, California, has heretofore commenced and is maintaining the Circuit Court for Clatsop County, State of Oregon, an action against petitioner herein, wherein recovery is sought for the alleged value of a raft of piling and its equipment lost upon Peacock Spit, at the mouth of the Columbia River, on the ninth day of September, 1911, while in tow of said tugs "Dauntless" and "Hercules," upon said voyages mentioned in said petition; and,

It further appearing that prayer is made in said petition herein for an order restraining said Hammond Lumber Company, its agents, officers and

attorneys from further prosecuting the aforesaid action, as well as all other persons from prosecuting any suits against petitioner herein, or said tugs, or either of them, save in this court, in respect of the loss of said raft, and any and all claims arising upon said voyages of said tugs mentioned in said petition; and,

The Court being fully advised in the premises:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that, until the further order of this Court, each and every corporation, person or persons having or claiming to have any demands against said steam tug "Dauntless," or against said steam tug "Hercules," or against the Shipowners & Merchants' Tugboat Company, petitioner [39] herein, for any loss, damage or injury caused by, or arising upon the voyages of said tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the ninth day of September, 1911, as set forth in the petition herein, be and they are hereby enjoined and restrained from beginning, prosecuting or maintaining any suit or suits against said tug "Dauntless," or against said tug "Hercules," or against the petitioner herein, except in this proceeding; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Hammond Lumber Company, its agents, officers and attorneys, be, and they and each of them are, hereby enjoined and restrained from further prosecuting in the Circuit Court of Clatsop County, State of Oregon, that certain action heretofore commenced by said Hammond Lumber

Company against the Shipowners & Merchants' Tugboat Company, petitioner herein, wherein recovery is sought for the value of said raft and equipment lost upon said voyages of said tugs "Dauntless" and "Hercules" referred to in the petition herein, leaving the port of Astoria, on the ninth day of September, 1911.

ENTERED, this 30th day of March, 1912.

E. S. FARRINGTON,
Judge.

[Endorsed]: Filed Mar. 30, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [40]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,234.

In the Matter of the Petition of THE SHIP-OWNERS AND MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

UNITED STATES MARSHAL'S RETURN OF SERVICE OF ATTESTED COPY OF RESTRAINING ORDER.

I, C. T. Elliott, United States Marshal, in and for the Northern District of California, hereby certify that on April, 1, 1912, I received from Messrs. Page, McCutchen, Knight & Olney, proctors for the petitioners herein, an attested copy of Restraining Order entered in the above-entitled proceeding, on the 30th day of March, 1912, and that thereafter, to

wit, on the 1st day of April, 1912, I handed to and left said attested copy of said Restraining Order with W. S. Burnett, who is the Vice-president of the Hammond Lumber Company of New Jersey, at [41] the office of said Hammond Lumber Company, at 260 California Street in the City of San Francisco, State of California.

C. T. ELLIOTT,
United States Marshal.
By M. J. Fitzgerald,
Office Deputy.

San Francisco, California, April 2d, 1912.

[Endorsed]: Filed April 2d, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [42]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS &
MERCHANTS' TUGBOAT COMPANY, a
Corporation, Owner of the Steam Tugs
"DAUNTLESS" and "HERCULES" for
Limitation of Liability.

**Notice of Presentation of Stipulations as to Tugs for
Approval.**

To Hammond Lumber Company and W. S. Burnett,
Its Proctor:

Please take notice that the undersigned, proctors
for Shipowners & Merchants' Tugboat Company, a
corporation, petitioner herein, will present to the

above-entitled court, for its approval, the original stipulations of which the copies attached hereto are true and correct copies, at the courtroom of said court, in the United States Postoffice Building, in the City of San Francisco, State of California, on Saturday, the 30th day of March, 1912, at the hour of ten o'clock A. M.

PAGE, McCUTCHEN, KNIGHT & OLNEY.

[43]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES" for Limitation of Liability.

WHEREAS, a libel has been filed in the District Court of the United States for the Northern District of California, First Division, on the 27th day of February, 1912, by Shipowners & Merchants' Tugboat Company, a corporation, as owner of the steam tug "Dauntless," praying for limitation of its liability concerning any loss, damage, or injury occasioned by or arising on that certain voyage of said tug, leaving Astoria on September 9, 1911, all as set forth in said petition; and,

WHEREAS the value of the interest of said petitioner in said steam tug "Dauntless," her engines, boilers, boats, tackle, apparel, furniture and appurtenances, has been duly appraised, under order of

this Court, at the sum of Forty-five Thousand (45,000) Dollars, which appraisement has heretofore been approved by this Court; and

WHEREAS, an order has been entered by this Court, directing that petitioner herein file an undertaking in the sum of Forty-five Thousand (45,000) Dollars, with interest thereon from the 9th day of September, 1911, conditioned as required by law; and,

WHEREAS, the parties hereto consent and agree and bind themselves, jointly and severally, in the sum of Forty-Five Thousand [44] (45,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, that in case of default or contumacy on the part of the petitioner, or its surety herein, in the performance of this stipulation, execution for the above appraised amount, with interest thereon at the legal rate, from said 9th day of September, 1911, may issue against its goods, chattels and lands;

NOW, THEREFORE, the condition of this stipulation is such that if the petitioner herein and The American Surety Company of New York, the stipulator, shall pay the said sum of Forty-five Thousand (45,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, into this court, whenever the same shall be ordered by this court, or by the Appellate Court, if an appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said Shipowners & Merchants' Tugboat Company, as principal, and The

American Surety Company of New York, as surety, have caused their corporate names to be hereunto subscribed and their corporate seals to be hereunto affixed by their respective officers, thereunto duly authorized this 29th day of March, 1912.

SHIPOWNERS & MERCHANTS' TUG-
BOAT COMPANY,

By W. J. GRAY,

Vice-president and Manager.

[Seal]

Attest: J. W. CURRY,

Secty.

AMERICAN SURETY COMPANY OF
NEW YORK,

By C. S. VAN BRUNDT,

Resident Vice-President.

[Seal]

By HAROLD M. PARSONS,

Resident Assistant Secretary. [45]

Taken and acknowledged before me, the undersigned, this —— day of March, 1912.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of
San Francisco, State of California.

United States of America,
Northern District of California,
City and County of San Francisco.

C. S. Van Brundt, being first duly sworn, on oath deposes and says:

That he is, and during all the times herein mentioned was, the resident Vice-president in the City of San Francisco, State of California, of The American Surety Company of New York; and that Harold M. Parsons is the resident Assistant Secretary in said city and State of said company, and that they

executed the foregoing and within stipulation for and on behalf of the said company; that said The American Surety Company of New York is worth the sum of Two Hundred and Fifty Thousand (250,000) Dollars over and above its just debts and liabilities and property exempt from execution.

C. S. VAN BRUNDT.

Subscribed and sworn to before me this 29th day of March, 1912.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

Approved this — day of March, 1912.

Judge. [46]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES" for Limitation of Liability.

WHEREAS, a libel has been filed in the District Court of the United States for the Northern District of California, First Division, on the 27th day of February, 1912, by Shipowners & Merchants' Tugboat Company, a corporation, as owner of the steam tug "Hercules," praying for limitation of its liability concerning any loss, damage, or injury occasioned by or arising on that certain voyage of said

tug, leaving Astoria on September 9, 1911, all as set forth in said petition; and,

WHEREAS, the value of the interest of said petitioner in said steam tug "Hercules," her engines, boilers, boats, tackle, apparel, furniture and appurtenances, has been duly appraised, under order of this Court, at the sum of Seventy Thousand (70,000) Dollars, which appraisement has heretofore been approved by this Court; and,

WHEREAS, an order has been entered by this Court, directing that petitioner herein file an undertaking in the sum of Seventy Thousand (70,000) Dollars, with interest thereon from the 9th day of September, 1911, conditioned as required by law; and,

WHEREAS, the parties hereto consent and agree and bind [47] themselves, jointly and severally, in the sum of Seventy Thousand (70,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, that in case of default or contumacy on the part of the petitioner, or its surety herein, in the performance of this stipulation, execution for the above appraised amount, with interest thereon at the legal rate, from said 9th day of September, 1911, may issue against its goods, chattels and lands;

NOW, THEREFORE, the condition of this stipulation is such that if the petitioner herein and The American Surety Company of New York, the stipulator, shall pay the said sum of Seventy Thousand (70,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, into this

court, whenever the same shall be ordered by this Court, or by the Appellate Court, if an appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said Shipowners & Merchants' Tugboat Company, as principal, and The American Surety Company of New York, as surety, have caused their corporate names to be hereunto subscribed and their corporate seals to be hereunto affixed by their respective officers, thereunto duly authorized, this 29th day of March, 1912.

SHIPOWNERS & MERCHANTS' TUG-
BOAT COMPANY,

By W. J. GRAY,
Vice-president and Manager.

[Seal]

Attest: J. W. CURRY,
Secty.

AMERICAN SURETY COMPANY OF
NEW YORK,

By C. S. VAN BRUNDT,
Resident Vice-president.

[Seal]

HAROLD M. PARSONS,
Resident Assistant Secretary. [48]

Taken and acknowledged before me this 29th day of March, 1912.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

United States of America,
Northern District of California,
City and County of San Francisco.

C. S. Van Brundt, being first duly sworn, on oath deposes and says:

That he is, and during all the times herein mentioned was, the resident Vice-president in the City of San Francisco, State of California, of The American Surety Company of New York; and that Harold M. Parsons is the resident Assistant Secretary in said city and State of said company, and that they executed the foregoing and within stipulation for and on behalf of the said company; that said The American Surety Company of New York is worth the sum of Two Hundred and Fifty Thousand (250,000) Dollars over and above its just debts and liabilities and property exempt from execution.

C. S. VAN BRUNDT.

Subscribed and sworn to before me this 29th day of March, 1912.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of
San Francisco, State of California.

Approved this — day of March, 1912.

Judge. [49]

Receipt of a copy of within is hereby admitted
this 29th day of March, 1912.

W. S. BURNETT,

Proctor for Hammond Lumber Co.

[Endorsed]: Filed Mar. 30, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [50]

[Stipulation as to Steam Tug "Dauntless."]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES" for Limitation of Liability.

WHEREAS, a libel has been filed in the District Court of the United States for the Northern District of California, First Division, on the 27th day of February, 1912, by Shipowners & Merchants' Tugboat Company, a corporation, as owner of the steam tug "Dauntless," praying for limitation of its liability concerning any loss, damage, or injury occasioned by or arising on that certain voyage of said tug, leaving Astoria on September 9, 1911, all as been approved by this Court; and,

WHEREAS the value of the interest of said petitioner in said steam tug "Dauntless," her engines, boilers, boats, tackle, apparel, furniture and appurtenances, has been duly appraised, under order of this Court, at the sum of Forty-five Thousand (45,000) Dollars, which appraisalment has heretofore been approved by this court; and,

WHEREAS, an order has been entered by this Court, directing that petitioner herein file an undertaking in the sum of Forty-five Thousand (45,000) Dollars, with interest thereon from the 9th day of

September, 1911, conditioned as required by law; and, [51]

WHEREAS, the parties hereto consent and agree and bind themselves, jointly and severally, in the sum of Forty-five Thousand (45,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, that in case of default or contumacy on the part of the petitioner, or its surety herein, in the performance of this stipulation, execution for the above appraised amount, with interest thereon at the legal rate, from said 9th day of September, 1911, may issue against its goods, chattels and lands;

NOW, THEREFORE, the condition of this stipulation is such that if the petitioner herein and The American Surety Company of New York, the stipulator, shall pay the said sum of Forty-five Thousand (45,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, into this court, whenever the same shall be ordered by this Court, or by the Appellate Court, if an appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said Shipowners & Merchants' Tugboat Company, as principal and The American Surety Company of New York, as surety, have caused their corporate names to be hereunto subscribed and their corporate seals to be hereunto affixed by their respective officers, thereunto fully au-

thorized this 29th day of March, 1912.

SHIPOWNERS & MERCHANTS' TUG-
BOAT COMPANY,

By W. J. GRAY,
Vice-president and Manager.

[Seal] Attest: J. W. CURRY,
Secty.

AMERICAN SURETY COMPANY OF
NEW YORK,

By C. S. VAN BRUNDT,
Resident Vice-president. [Seal]
Attest: HAROLD M. PARSONS,
Resident Assistant Secretary. [52]

Taken and acknowledged before me, the under-
signed, this 29th day of March, 1912.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San
Francisco, State of California.

United States of America,
Northern District of California,
City and County of San Francisco.

C. S. Van Brundt, being first duly sworn, on oath
deposes and says:

That he is, and during all the times herein men-
tioned was, the resident Vice-president in the city
of San Francisco, State of California, of The Amer-
ican Surety Company of New York; and that Har-
old M. Parsons is the resident assistant Secretary
in said city and state of said company, and that they
executed the foregoing and within stipulation for
and on behalf of the said company; that said The

American Surety Company of New York is worth the sum of Two Hundred and Fifty Thousand (250,000) Dollars over and above its just debts and liabilities and property exempt from execution.

C. S. VAN BRUNDT.

Subscribed and sworn to before me this 29th day of March, 1912.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

Approved this 30th day of March, 1912.

E. S. FARRINGTON,

Judge.

[Endorsed]: Filed Mar. 30, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [53]

[Stipulation as to Steam Tug "Hercules."]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

WHEREAS, a libel has been filed in the District Court of the United States for the Northern District of California, First Division, on the 27th day of February, 1912, by Shipowners & Merchants' Tugboat Company, a corporation, as owner of the steam tug

"Hercules," praying for limitation of its liability concerning any loss, damage, or injury occasioned by or arising on that certain voyage of said tug, leaving Astoria on September 9, 1911, all as set forth in said petition; and,

WHEREAS, the value of the interest of said petitioner in said steam tug "Hercules," her engines, boilers, boats, tackle, apparel, furniture and appurtenances, has been duly appraised, under order of this Court, at the sum of Seventy Thousand (70,000) Dollars, which appraisement has heretofore been approved by this Court; and,

WHEREAS, an order has been entered by this Court, directing that petitioner herein file an undertaking in the sum of Seventy Thousand (70,000) Dollars, with interest thereon from the [54] 9th day of September, 1911, conditioned as required by law; and,

WHEREAS, the parties hereto consent and agree and bind themselves, jointly and severally, in the sum of Seventy Thousand (70,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, that in case of default or contumacy on the part of the petitioner, or its surety herein, in the performance of this stipulation, execution for the above appraised amount, with interest thereon at the legal rate, from said 9th day of September, 1911, may issue against its goods, chattels and lands;

NOW, THEREFORE, the condition of this stipulation is such that if the petitioner herein and The American Surety Company of New York, the stipu-

lator, shall pay the said sum of Seventy Thousand (70,000) Dollars, with interest thereon at the legal rate, from the 9th day of September, 1911, into this court, whenever the same shall be ordered by this Court, or by the Appellate Court, if an appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said Shipowners & Merchants' Tugboat Company, as principal, and The American Surety Company of New York, as surety, have caused their corporate names to be hereunto subscribed and their corporate seals to be hereunto affixed by their respective officers, thereunto duly authorized, this 29th day of March, 1912.

SHIPOWNERS & MERCHANTS' TUG-
BOAT COMPANY,

By W. J. GRAY,
Vice-president and Manager.

[Seal]

Attest: J. W. CURRY,
Secty.

AMERICAN SURETY COMPANY OF NEW
YORK,

By C. S. VAN BRUNDT,
Resident Vice-president.

[Seal]

Attest: HAROLD M. PARSONS,
Resident Assistant Secretary. [55]

Taken and acknowledged before me this 29th day
of March, 1912.

[Seal]

FRANK L. OWEN,
Notary Public in and for the City and County of San
Francisco, State of California.

United States of American,
Northern District of California,
City and County of San Francisco.

C. S. Van Brundt, being first duly sworn, on oath deposes and says:

That he is, and during all the times herein mentioned was, the resident Vice-president in the City of San Francisco, State of California, of The American Surety Company of New York; and that Harold M. Parsons is the resident Assistant Secretary in said city and state of said company, and that they executed the foregoing and within stipulation for and on behalf of the said company; that said The American Surety Company of New York is worth the sum of Two Hundred and Fifty Thousand (250,000) Dollars over and above its just debts and liabilities and property exempt from execution.

C. S. VAN BRUNDT,

Subscribed and sworn to before me this 29th day of March, 1912.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

Approved this 30th day of March, 1912.

E. S. FARRINGTON,

Judge.

[Endorsed]: Filed Mar. 30, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [56]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS &
MERCHANTS' TUGBOAT COMPANY, a
Corporation, Owner of the Steam Tugs
"DAUNTLESS" and "HERCULES," for
Limitation of Liability.

Order for Issuance of Monition, etc.

It appearing to this Court that Shipowners & Merchants' Tugboat Company, a corporation, petitioner herein, filed in this court on the 27th day of February, 1912, its petition for limitation of liability; and,

It further appearing that due appraisement, under oath of this Court, has been made by the Hon. James P. Brown, appraising the value of the interest of said petitioner in the Steam Tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, as the same were immediately after the close of their respective voyages mentioned in said petition; and,

It further appearing that the report of said Commissioner was filed with this court on the 23d day of March, 1912, and thereafter approved by this Court on the 29th day of March, 1912; and, [57]

It further appearing that stipulations, duly approved by this Court, have been filed herein on the 30th day of March, 1912, conditioned that the peti-

tioner herein will pay into this court whenever the same may be ordered either by this Court, or by the Appellate Court, in the event that an appeal intervenes, the aforesaid appraised value of the interest of said petitioner in said tugs "Dauntless" and "Hercules," as the same were immediately after the close of their respective voyages mentioned in said petition, together with interest thereon from the 9th day of September, 1911; and,

It further appearing that prayer is made in the petition herein for the issuance of a monition against the Hammond Lumber Company, and all other persons claiming damages of said petitioner, by reason of injuries to persons, or to property, occurring or arising upon the aforesaid voyages of said tugs "Dauntless" and "Hercules," or resulting from the loss, upon said voyages, of a raft of piling belonging to said Hammond Lumber Company, citing them, and each of them, to appear before this Court and there make due proof of their respective claims.

And the Court being fully advised in the premises:

NOW, THEREFORE, it is hereby ordered that a monition issue out of this court against all persons claiming damages by reason of injuries to persons, or to property, occurring or arising upon those certain voyages of the steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, State of Oregon, on the 9th day of September, 1911, citing them to appear before James P. Brown, United States Commissioner, and make due proof of their respective claims, at or before a certain date to be named

in said writ, not less than three months [58] from the issuing of the same, and also citing them to appear and answer in said cause; and,

Be it further ordered that public notice of the issuance of said monition be given by publication in a daily newspaper, published in the City and County of San Francisco, State of California, once a week, until the return date fixed in said monition, which shall not be less than three months after the first publication thereof; and,

Be it further ordered that public notice of the issuance of said monition be also given in said cause, by the posting of copies of said monition in three public places in the City and County of San Francisco; and,

Be it further ordered that service of said monition be made upon Hammond Lumber Company, a corporation, by serving a copy thereof upon an officer of said corporation, at its office, No. 260 California Street, City of San Francisco, State of California.

Entered this 2d day of April, 1912.

E. S. FARRINGTON,
Judge.

[Endorsed]: Filed April 2, 1912. Jas. P. Brown,
Clerk. M. T. Scott, Deputy Clerk. [59]

[Return of Marshal on Monition.]

United States of America,
Northern District of California.

San Francisco, April 13, 1912.

I hereby certify and return that I served the an-

nexed Monition on the Hammond Lumber Company, a corporation, at 260 California Street, San Francisco, by handing to and leaving an attested copy thereof with W. S. Burnett, who is the Vice-president of the Hammond Lumber Company of New Jersey, personally on the 2d day of April, A. D. 1912.

I further return that at the request of Messrs. Page, McCutchen, Knight and Olney, the proctors for the petitioners herein, I posted a certified copy of the annexed Monition in the following public places in the city of San Francisco, to wit, one at the Hall of Justice at Kearny and Washington Streets, one at the City Hall, located on the south side of Market Street, between Eighth and Ninth Streets, and one at the United States Postoffice and Court-house building at Seventh and Mission Streets.

C. T. ELLIOTT,

U. S. Marshal.

By M. J. Fitzgerald,
Office Deputy. [60]

*In the District Court of the United States for the
Northern District of California.*

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Monition.

The President of the United States of America to the Marshal of the Northern District of California, Greeting:

WHEREAS, a libel and petition hath been filed in the District Court of the United States for the Northern District of California, on the 27th day of February, 1912, by the Shipowners & Merchants' Tugboat Company, praying for limitation of its liability concerning any and all loss, damage or injury, either to persons or to property, occurring or arising upon those certain voyages of the steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911; and particularly praying for limitation of liability against any claim for loss or damage resulting from the loss, on said 9th day of September, 1911, of a raft of piling belonging to the Hammond Lumber Company, while being towed by said tugs "Dauntless" and "Hercules" upon said respective voyages, for the reasons and causes in said libel and petition mentioned, and praying a monition of said Court in that behalf to be issued, and that all persons claiming damage for any loss, damage or injury [61] occurring or arising upon said voyages, may be thereby cited to appear before said Court and make due proof of their respective claims, and all proceedings being had, if it shall appear that the petitioner is not liable for any such loss, damage or injury, that it may be so finally decreed by this Court; and,

WHEREAS, by order of this Court, the values of the interests of said petitioner in said steam tugs "Dauntless" and "Hercules" have been appraised at the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars; and,

WHEREAS, pursuant to the requirements of said order, said petitioner has filed stipulations in the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, with good and sufficient surety, whereby said petitioner and said surety are obligated to pay said respective sums of money, or any part thereof, with interest thereon from the 9th day of September, 1911, into this court, whenever the same may be ordered; and,

WHEREAS, the said Court has ordered that a monition issue against all persons claiming damage for any loss, damage or injury occurring, or arising, upon said voyages of said tugs "Dauntless" and "Hercules," leaving the port of Astoria, on the 9th day of September, 1911, citing them to appear and make due proof of their respective claims;

NOW, THEREFORE, you are hereby commanded to cite all corporations, person or persons, claiming damages for any loss, damage or injury occurring, or arising, upon said voyages of said steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, and particularly to cite the Hammond Lumber Company, [62] a corporation, claiming damages for the loss of a raft of piling upon said voyages, to appear before said Court and make due proof of their respective claims before James P. Brown, Esq., United States Commissioner, at his office in the Post-office Building, on the corner of Mission and Seventh Streets, in the City of San Francisco, on or before the 10th day of July, 1912, at ten o'clock in the forenoon; and you are also commanded to cite such claim-

ants to appear and answer the allegations of the libel and petition herein on or before said last-named date, or within such further time as the Court may grant, and to have and receive such relief as may be due.

And what you have done in the premises, do you then make return to this Court, together with this Writ.

WITNESS the Honorable E. S. FARRINGTON, Judge of the United States District Court for the Northern District of California, this 2d day of April, 1912, and of our Independence the year one hundred and thirty-seven.

[Seal]

JAS. P. BROWN,
Clerk.

By M. T. Scott,
Deputy Clerk.

[Endorsed]: Filed Apr. 3, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [63]

[Supplemental Return of Marshal on Monition.]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

MARSHAL'S SUPPLEMENTAL RETURN.

I HEREBY CERTIFY AND RETURN that, as

directed, by an order entered by the above-entitled court on the 30th day of March, 1912, and as commanded by the monition issued on the 2d day of April, 1912, under order and seal of said court, I cited all corporations and persons claiming damages for loss, damage or injury occurring or arising upon the voyages of the steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, to appear before the above-entitled court, and make due proof of their respective claims before James P. Brown, United States Commissioner, at his office, in the Postoffice Building, on the corner of Seventh and Market Streets in the city of San Francisco, on or before the 10th day of July, 1912, at 10 o'clock in the forenoon, by giving public notice of said monition by posting certified copies thereof in three public places at the City and County of San Francisco, [64] State of California, to wit, one at the Hall of Justice at Kearny and Washington Streets; one at the City Hall located on the south side of Market Street between Eighth and Ninth Streets, and one at the United States Postoffice and Courthouse Building, at Seventh and Mission Streets; and by causing a copy of said monition to be published once a week from the 4th day of April, 1912, unto the 9th day of July, 1912, in the "Recorder," a newspaper of general circulation, printed and published daily (Sundays and legal holidays excepted), in the City and County of San Francisco, State of California, as shown by the attached affidavit of the principal clerk of "The Recorder Printing & Publishing Company," printers and pub-

lishers of said newspaper, which affidavit of publication is hereby made a part of this return. I further certify that I particularly cited the Hammond Lumber Company, a corporation, claiming damages for the loss of a raft of piling upon said voyages of said steam tugs, by handing a certified copy of said monition to, and leaving the same with W. S. Burnett, Vice-president of the Hammond Lumber Company, at the office of said Company, to wit, No. 260 California Street, City of San Francisco, on the 2d day of April, 1912.

C. T. ELLIOTT,

U. S. Marshal.

By M. J. Fitzgerald,

Office Deputy. [65]

AFFIDAVIT OF PUBLICATION

in

THE "RECORDER."

*In the District Court of the United States, for the
Northern District of California, First Division.*

IN ADMIRALTY.

State of California,

City and County of San Francisco,—ss.

E. C. Luchessa, of the said City and County, having been first duly sworn, deposes and says:

That he is, and at all times herein mentioned, was a citizen of the United States, over twenty-one years of age; and is competent to be a witness on the hearing of the matters mentioned in the annexed printed copy of Monition:

That he has no interest whatsoever in the matters mentioned therein; that is he, and at all times embraced in the publication herein mentioned was, the Principal Clerk of The Recorder Printing and Publishing Company, printers and publishers of the "Recorder," a newspaper of general circulation, printed and published daily (Sundays and legal holidays excepted) in said City and County.

That deponent, as such Clerk, during all times mentioned in this affidavit has had, and still has, charge of all the advertisements in said newspaper.

That a Monition, of which the annexed is a true printed copy, was published in the above-named newspaper on the following dates, to wit: April 4th, 11th, 18th, and 25th, 1912; May 2nd, 9th, 16th, 23rd, 29th, and 31st, 1912; June 6th, 13th, 20th and 27th, 1912; and July 3rd, 5th, and 9th, 1912; [66] and further deponent sayeth not.

E. C. LUCHESSA.

Subscribed and sworn to before me this 9th day of July, 1912.

[Seal]

CHARLES R. HOLTON,
Notary Public, in and for the City and County of
San Francisco, State of California. [67]

MONITION.

*In the District Court of the United States, for the
Northern District of California, First Division.*

IN ADMIRALTY.

In the Matter of the Petition of SHIPOWNERS
& MERCHANTS' TUGBOAT COMPANY, a
Corporation, Owner of the Steam Tugs
"DAUNTLESS" and "HERCULES," for
Limitation of Liability.

The President of the United States of America, to
the Marshal of the Northern District of Cali-
fornia: Greeting:

Whereas, a libel and petition hath been filed in
the District Court of the United States, for the
Northern District of California, on the 27th day of
February, 1912, by the Shipowners & Merchants'
Tugboat Company, praying for limitation of its li-
ability concerning any and all loss, damage or injury,
either to persons or to property, occurring or arising
upon those certain voyages of the steam tugs "Daunt-
less" and "Hercules," leaving the port of Astoria,
Oregon, on the 9th day of September, 1911, and parti-
cularly praying for limitation of liability against any
claim for loss or damage resulting from the loss, on
said 9th day of September, 1911, of a raft of piling be-
longing to the Hammond Lumber Company, while be-
ing towed by said tugs "Dauntless" and "Hercules,"
upon said respective voyages, for the reasons and
causes in said libel and petition mentioned, and pray-
ing a monition of said Court in that behalf to be is-

sued, and that all persons claiming damage, occurring or arising upon said voyages, may be thereby cited to appear [68] before said Court and make due proof of their respective claims, and all proceedings being had, if it shall appear that the petitioner is not liable for any such loss, damage or injury, that it may be so finally decreed by this Court; and,

Whereas, by order of this court, the values of the interests of said petitioner in said steam tugs "Dauntless" and "Hercules" have been appraised at the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars; and,

Whereas pursuant to the requirements of said order, said petitioner has filed stipulations in the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, with good and sufficient surety, whereby said petitioner and said surety are obligated to pay said respective sums of money, or any part thereof, with interest thereon from the 9th day of September, 1911, into this court, whenever the same may be ordered; and,

Whereas the said court has ordered that a monition issue against all persons claiming damage for any loss, damage or injury occurring, or arising, upon said voyages of said tugs "Dauntless" and "Hercules," leaving the port of Astoria, on the 9th day of September, 1911, citing them to appear and make due proof of their respective claims.

Now, therefore, you are hereby commanded to cite all corporations, person or persons claiming damages for any loss, damage, or injury, occurring, or arising,

upon said voyages of said steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, and particularly to cite the Hammond Lumber Company, a corporation, claiming damages for the loss of a raft of piling upon said voyages to [69] appear before said court and make due proof of their respective claims before James P. Brown, Esq., United States Commissioner at his office in the Postoffice Building, on the corner of Mission and Seventh Streets, in the City of San Francisco, on or before the 10th day of July, 1912, at ten o'clock, in the forenoon; and you are also commanded to cite such claimants to appear and answer the allegations of the libel and petition herein on or before said last named date, or within such further time as the Court may grant, and to have and receive such relief as may be due.

And what you have done in the premises, do you then make return to this court, together with this writ.

WITNESS the Honorable E. S. FARRINGTON, Judge of the United States District Court, for the Northern District of California, this 2d day of April, 1912, and of our independence the year one hundred and thirty-seven.

[Seal]

JAS. P. BROWN,

Clerk.

By M. T. Scott,

Deputy Clerk.

64 *The Shipowners & Merchants' Tugboat Co.*

[Endorsed]: Filed Apr. 3, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Proctors for Petitioner,
1107 Merchants Exchange Build-
ing, San Francisco, Cal.

Apr. 4-11-18-25:

May 2-9-16-23-29-31:

June 6-13-20-27:

July 3-5-9.

[Endorsed]: Filed Jul. 12, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [70]

**[Order Entering Default as to All Parties Except
the Hammond Lumber Co.]**

At a stated term of the District Court of the United
States of America for the Northern District of
California, held at the Courtroom thereof, in the
City and County of San Francisco, on Wednes-
day, the 10th day of July, in the year of our
Lord, one thousand nine hundred and twelve.
Present: The Honorable JOHN J. DE HAVEN,
Judge.

#15,234.

In Re Petition of SHIPOWNERS AND MER-
CHANTS' TUGBOAT COMPANY, a Cor-
poration, Owners of the Steam Tugs
"DAUNTLESS" and "HERCULES," for
Limitation of Liability.

The United States Marshal having returned upon
the monition issued herein that "I hereby certify and
return that I served the annexed monition on the

Hammond Lumber Company, a corporation, at 260 California Street, San Francisco, by handing to and leaving an attested copy thereof with W. S. Burnett, who is the Vice-president of the Hammond Lumber Company of New Jersey, personally, on the 2d day of April, A. D. 1912.

“I further return that at the request of Messrs. Page, McCutchen, Knight and Olney, the proctors for the petitioners herein, I posted a certified copy of the annexed monition in the following public places in the City and County of San Francisco, to wit, one at the Hall of Justice at Kearney and Washington Streets, one at the City Hall located on the south side of Market Streets between Eighth and Ninth Streets, and one at the United States Postoffice and Court-house Building, at Seventh and *Market* Streets.

C. T. ELLIOTT,

U. S. Marshal.

By M. J. Fitzgerald,

Office Deputy.”

On motion of Ira Campbell, Esqr., proctor for petitioner, proclamation was duly made for all persons claiming damages for any loss, damage or injury occurring or arising upon certain voyages of the steam tugs “Dauntless” and “Hercules,” leaving the port of [71] Astoria, Oregon, on the 9th day of September, 1911, and particularly any claim for damage or loss of a raft of pilings upon said voyage, to appear and answer the petition herein; no appearance being made, on motion of Ira Campbell, Esqr., by the Court ordered that the default of all parties be, and the same is hereby entered, except the Hammond

Lumber Company, a Corporation, which be, and it is hereby granted ten days in which to plead to said petition. [72]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Report of Commissioner as to Claims.

I, Jas. P. Brown, the undersigned, United States Commissioner, duly designated by this Court as the Commissioner before whom all claims in the above-entitled proceeding were ordered to be presented, *to* hereby CERTIFY that the time fixed in the monition issued pursuant to order of this Court, within which claims might be presented, expired on the 10th day of July, 1912, and that no claims of any character were filed with me on or before said 10th day of July, 1912, as by said monition required, and that on said day an order of default was entered against all persons not having presented their claims, as directed by said monition.

And I DO FURTHER CERTIFY that no request has been made of me to file any claims since said

order of default was entered.

Dated, July 11, 1912.

[Seal]

JAS. P. BROWN,

United States Commissioner for the Northern District of California.

[Endorsed]: Filed Jul. 11, 1912. Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk. [73]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Interlocutory Decree of Default.

It appearing to this Court that Shipowners & Merchants' Tugboat Company, a Corporation, petitioner herein, filed in this court on the 27th day of February, 1912, its petition for limitation of liability; and,

It further appearing that due appraisement, under order of this Court, has been made by the Hon. James P. Brown, appraising the value of the interest of said petitioner in the steam tugs "Dauntless" and "Hercules," their boilers, engines, boats, tackle, apparel, furniture and appurtenances, at the respective sums of Forty-five Thousand (45,000) Dollars and Seventy Thousand (70,000) Dollars, as the same were immediately after the close of their respective

voyages mentioned in said petition; and,

It further appearing that the report of said commissioner was filed with this Court on the 23d day of March, 1912, and thereafter approved by this Court on the [74] 29th day of March, 1912; and,

It further appearing that stipulations, duly approved by this Court, have been filed herein on the 30th day of March, 1912, conditioned that the petitioner herein will pay into this court whenever the same may be ordered either by this Court, or by the Appellate Court, in the event that an appeal intervenes, the aforesaid appraised value of the interest of said petitioner in said steam tugs "Dauntless" and "Hercules," as the same were immediately after the close of their respective voyages mentioned in said petition, together with interest thereon from the 9th day of September, 1911; and,

It further appearing that thereafter on the 2d day of April, 1912, a monition issued under order and seal of this court, and that the marshal for the Northern District of California, as commanded by said monition, cited all corporations, person or persons claiming damages for any loss, damage or injury occurring or arising upon said voyages of said steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, and particularly the Hammond Lumber Company, a corporation, claiming damages for the loss of a raft of piling upon said voyages, to appear before said Court and make due proof of their respective claims before James P. Brown, Esq., United States Commissioner, at his office in the Postoffice Building, on the

corner of Seventh and Mission Streets, in the City of San Francisco, on or before the 10th day of July, 1912, at 10 o'clock in the forenoon, by giving public notice of said monition, as ordered by this Court, by posting copies of said monition in three public [75] places in the City and County of San Francisco, State of California, and by serving a copy of said monition upon said Hammond Lumber Company, a corporation, at its office, No. 260 California Street, City of San Francisco, State of California; and, that further public notice of said monition was given pursuant to order of this Court by publishing in the "Recorder" a newspaper of general circulation, printed and published daily (Sundays and legal holidays excepted) in the City and County of San Francisco, State of California, a copy of said monition, once a week until the return day fixed in said monition, to wit, the 10th day of July, 1912; and,

It further appearing that on the return day of said monition, to wit, on the 10th day of July, 1912, at the hour of 10 o'clock in the forenoon, the crier of this court made proclamation for all corporations, person or persons claiming damages for any loss, damage, or injury occurring or arising upon the aforesaid voyages of the steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on the 9th day of September, 1911, and particularly anyone claiming damages for the loss of a raft of piling upon said voyages, to come into court and make due proof of their said claims and answer the petition of the Shipowners & Merchants' Tugboat Company, petition herein, for limitation of liability,

under pain of being pronounced in contumacy and default and having said petition taken *pro confesso* against them; and,

It further appearing that no corporation, person or persons, other than the Hammond Lumber Company, appeared in response to said proclamation, and that thereupon, on [76] motion of proctors for petitioner, an order was entered pronouncing in default all corporations, person or persons, save and except the said Hammond Lumber Company, who might have any claim for loss, damage or injury occurring or arising upon the aforesaid voyages of said steam tugs "Dauntless" and "Hercules"; and,

It further appearing from the report of James P. Brown, Esq., the United States Commissioner named in said monition, that no claims have been filed with him as directed by said monition;

And the Court being fully advised in the premises:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the default of all persons and corporations save and except the Hammond Lumber Company, having any claims against the Shipowners & Merchants' Tugboat Company, petitioner herein, or said steam tugs "Dauntless" or "Hercules," for any loss, damage or injury occurring or arising upon those certain voyages of said steam tugs "Dauntless" and "Hercules," leaving the port of Astoria, Oregon, on September 9, 1911, and particularly of all persons and corporations, save and except the Hammond Lumber Company, claiming damages for the loss of a raft of pil-

ing upon said voyages, be, and the same is, hereby entered.

Dated at San Francisco, this 12th day of July, 1912.

JOHN J. DE HAVEN,

Judge.

[Endorsed]: Filed Jul. 12, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [77]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY.

In the Matter of the Petition of the SHIPOWNERS
& MERCHANTS' TUGBOAT COMPANY, a
Corporation, Owner of the Steam Tugs
"DAUNTLESS" and HERCULES," for
Limitation of Liability.

Exception to Petition.

Now comes the Hammond Lumber Company, a
corporation, claimant herein, and, excepting to the
petition of petitioner on file herein, avers:

I.

That the said petition fails to set forth facts sufficient to give this Court jurisdiction for adjudicating the limitation of liability for the acts your petitioner sets forth therein, and assigns the following particulars in which the said petition fails to set forth a cause of action:

1. Said petition fails to show that more than one person was damaged by reason of the acts set forth therein, or that there is more than one claim for dam-

age or injury or loss, arising from said acts, and hence the petition fails to show that there is any multiplicity of claims, demands, or interests which the pendency of the said litigation will prevent, or from which it will relieve the petitioner.

2. The said petition fails to show that the value of said tugs, or that the value of either of them, is less than the loss, damage, or injury done, suffered or incurred by reason of the acts described therein, and hence the said petition [78] fails to show that there is, or could be, any limitation of liability.

WHEREFORE claimant prays that the said petition for limitation of liability be dismissed, and that claimant have judgment for its costs herein.

W. S. BURNETT,
WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Claimant.

Service admitted July 20, 1912.

PAGE, McCUTCHEN, KNIGHT & OLNEY,
Proctors for Petitioner.

[Endorsed]: Filed Jul. 30, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [79]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY.

In the Matter of the Petition of the SHIPOWNERS
& MERCHANTS' TUGBOAT COMPANY,
a Corporation, Owner of the Steam Tugs
"DAUNTLESS" and "HERCULES," for
Limitation of Liability.

Claim of Hammond Lumber Company.

To the Honorable J. J. DE HAVEN, Judge of the United States District Court for the Northern District of California, and to James P. Brown, Esquire, United States Commissioner for the Said Court:

Now comes the Hammond Lumber Company, a corporation hereinafter called the claimant, and, without waiving its right to protest the jurisdiction of the said Court to entertain the said proceedings for limitation of liability, files its claim herein and alleges as follows:

I.

That claimant is now, and during all of the times herein mentioned was, a private corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and engaged in business and having an office at the City of Astoria, in Clatsop County, State of Oregon, and duly registered and licensed to do business under and by virtue of the laws of the State of Oregon; and is and during all of the times herein mentioned was engaged in the manufacture and sale of saw logs, spars, and products of the forest and in the construction of sea-going rafts containing piling, spars and saw logs. [80]

II.

That the petitioner is now and during all of the times herein mentioned was a private corporation, duly organized and existing under and by virtue of the laws of the State of California, and was and is engaged in the general towing business and in tow-

ing rafts from the port of Astoria, in Oregon, to the port of San Francisco, California, and was, during all the times herein mentioned, the owner of the steam tugboats "Dauntless" and "Hercules," each licensed to engage in and engaged in the general towage business and coastwise trade, in the United States, and Pacific Ocean, and also engaged in the general business of towing rafts of piling, spars and saw logs from the Columbia River to points in California.

III.

That on or about the 9th day of November, 1911, claimant did file its complaint against the petitioner in the Circuit Court of the State of Oregon for Clatsop County, in that certain suit entitled: "In the Circuit Court of the State of Oregon for Clatsop County, Hammond Lumber Company (a Corporation), Plaintiff, vs. Shipowners and Merchants Tugboat Company (a Corporation), Defendant"; and that thereafter and prior to the filing of the stipulation herein for the value of the "Dauntless" and of the "Hercules," claimant did file in the said suit its Amended Complaint, and served the same upon petitioner, and the petitioner did file its answer to said Amended Complaint, joining issue within the allegations of the said Amended Complaint; and that said cause did then stand at issue and ready for trial, and does now so stand at issue and ready for trial; that the cause of action set forth and described in the said Amended Complaint filed in the said suit in the State of Oregon is in all respects the same as that set forth in [81] this claim; that this is the only

claim filed in this proceeding; that this claim is for a sum less than the value of the tugs "Dauntless" and "Hercules" and the sum stipulated to be paid in lieu of their surrender in the stipulation for value of the said vessels and their freight pending, heretofore filed herein.

IV.

That on the 30th day of August, 1911, the claimant and petitioner entered into a contract wherein and whereby the petitioner agreed to and with the claimant, in consideration of the sum of \$2,250 to be paid to the petitioner by claimant upon the completion of the towage hereinafter described, to safely tow for the claimant a large raft of piling and spars from Flavel in the port of Astoria, in Oregon, to the port of San Francisco, in the State of California, and thereupon and pursuant thereto this claimant constructed in a first-class manner a large raft of piling and spars and completed the same on or about the 8th day of September, 1911, and bound the same together with *a* large and heavy chains, wire rope cables and other appliances.

That said raft when completed on said date and at the time it became a total loss as hereinafter stated, contained 592-499 lineal feet of piling and spars, and the piling and spars in said raft were of the reasonable value of \$59,249.90. That said raft as completed, including the piling and spars and chains, wire cable, shackles, turn buckles, and equipment, was at said times of the full and reasonable value of \$71,249.90. [82]

V.

That thereafter and on the 9th day of September, 1911, pursuant to said contract aforesaid so entered into between claimant and petitioner, the claimant delivered said raft so constructed and equipped ready for sea to the petitioner at Flavel in the port of Astoria to be by the petitioner towed from said port to the port of San Francisco, in the State of California, and there delivered to claimant; and the said petitioner there and on that date received and took into its possession the said raft so constructed as aforesaid, and pursuant to said contract aforesaid, undertook to safely tow the same from said port of Astoria in Oregon to the port of San Francisco, in the State of California, and there deliver same to claimant. That in order to tow the same the said petitioner used and employed the said steam tug "Dauntless" and the said steam tug "Hercules" each of which was equipped with a towing machine. That petitioner fastened the said "Dauntless" to said raft with a long towing cable, one end of which was wound around the drum of the towing machine on said "Dauntless" and the other end fastened to said raft, and the said "Hercules" was fastened to the "Dauntless," which a long towing cable leading through the forward bits of the "Dauntless" to the towing machine of the "Hercules," being thus equipped, said two tugs started to sea with said raft on said date aforesaid; but the said petitioner so negligently and carelessly conducted itself that the said raft was entirely lost, destroyed and became a total loss to the claimant, for that at the time said

raft was delivered to the said petitioner, as aforesaid, and at the time petitioner received the same and started to tow the same to the port of San Francisco, under said contract aforesaid, the [83] weather and conditions on the Columbia River, Ocean and Columbia River bar were favorable, but there was, as usual at the then stage of the tide, of which the servants and officers of petitioner in charge of the said tugs had actual notice, a northward drift of the current in the waters of the said Columbia River, and at the mouth thereof, and in the said ocean, towards, over and across a large spit on the northerly edge of the channel of said river at the mouth thereof, called and generally known as "Peacock Spit," a dangerous spit near the mouth of said river, where the waters of the river and ocean meet and which, if struck by said raft, or if such raft should come in contact therewith, or be grounded thereon, would become a wreck and total loss, all of which was well known to the petitioner, its servants, masters and officers in charge of said tugboats, and all of which dangers could have been easily and readily avoided by taking the southerly side of such channel, but the said petitioner, through its servants, masters and officers in charge of said tugs, carelessly and negligently failed and neglected to, and did not, tow said raft by the southerly course through said channel, as aforesaid, but carelessly and negligently attempted to tow the same along the northerly side of said channel, and over and against the said Peacock Spit, and carelessly and negligently towed said raft so close to said spit that they

lost control thereof, and the same broke away from said tugs and drifted upon said spit, and the same became and was broken, and a total loss.

That at the time the said tug "Dauntless" and the said tug "Hercules" took said raft in tow, the towing machinery and appliances and the machinery and the appliances on the said tug "Dauntless," to which was fastened the tow-line leading from [84] the said tug "Dauntless" to said raft, and with which said tow-line was manipulated, and with which said raft was towed, and which was compelled to resist the combined strain of the power of the "Hercules," as well, was and continued to be thereafter, old, and worn, and useless, and defective, and out of repair, and of insufficient size, capacity and strength, and the brake and brakes thereof were out of repair and were also incapable of holding, and of insufficient strength to hold and tow said raft, with the said combined strain of said two tugs, and the said towing machinery and appliances on such tug "Dauntless" were, and each was, of insufficient strength to hold and tow said raft, and particularly to hold and tow the same with such combined power and strain through the said northerly channel, and while said raft was in tow of said tug "Hercules" and said tug "Dauntless," and in the waters of the said Columbia River and near the said Peacock Spit aforesaid, and in said north channel aforesaid, by reason of said insufficient towing machinery and appliances, and brake and brakes aforesaid, and by reason of the fact that the towing machinery and appliances to which were fastened to tow-line lead-

ing from said raft aforesaid was of insufficient strength and power to hold and tow said raft, with such combined strain of said two tugs, and because of the fact that the said tow-line leading from said raft and by which it was towed was not fastened to the said towing machinery on said tug "Dauntless," the said tow-line paid out and slipped loose from, and became wholly detached from said towing machinery and from said tug "Dauntless," aforesaid, and thereupon said raft drifted over and upon and against said Peacock Spit, where it became wrecked and a total loss to plaintiff. [85]

The claimant further avers, that at and during all the times herein mentioned, the said channel of said river, and the channel over the bar and into the said ocean, was fully one mile in width, and of sufficient depth to successfully and safely and securely tow said raft through the same to the sea. That the waters of said channel gradually shallowed near said Peacock Spit, at and around which the waters are at all times very rough, and a heavy sea at all times prevails there, all of which was well known to petitioner at and during all the times herein mentioned.

That the said petitioner by and through its said masters and officers and navigators of said two steam tugs aforesaid carelessly and recklessly towed said raft too close to said Peacock Spit, and into shallow water where said raft could not be successfully managed, and in great danger of destruction, although at said time there was sufficient water in the channel of such river to safely tow said raft as aforesaid. That in making such tow as aforesaid, said peti-

tioner through its said officers and agents and masters of said two tugboats, failed to and did not exercise maritime skill, in that said two tugboats were unskillfully and carelessly maneuvered, the leading tug not keeping in line, so that the power thereof was not permitted to be transferred to said raft, and the tow-lines on each tug were neither looked after or watched or cared for, but were permitted by the unskillful maneuvering of said two tugboats, and failure to watch same, to become at times slackened, and then the full power of each tug with the added velocity of their speed thrown against the same, and such lines tightened whereby the towing machinery of each was subjected to a great and unnecessary strain, [86] and the raft having an unequal tow, was not at all times under control as it should have been by the exercise of ordinary maritime skill. That the towing machine on each tug was operated by steam, and required a steady high pressure of steam to successfully operate the same, but such steam pressure was permitted to run down, whereby said towing machine could not be skillfully or properly manipulated. That in order to safely tow said raft with the combined power and strain of both the said tugs, it was necessary that the tow-line running from the said raft to the said "Dauntless" should have been safely and securely fastened to the towing machine by securely fastening the end of such tow-line to the flange of the drum on the towing machine thereon, and winding such tow-line around such drum a sufficient number of times to maintain and keep the same securely fastened thereto and pre-

vent the same from slipping off, but by reason of the carelessness and negligence of the said petitioner, such tow-line was not safely, nor was it securely fastened to the flange of the said drum and wound around the same a sufficient number of times to keep the same from slipping off therefrom, but in spite of the combined strain of both the said tugs, was carelessly and negligently permitted to remain wholly unsecured, and allowed to pay out until wholly unwound from such drum, and held in such a manner that when the strain of the two tugs was placed on such raft, it would slip off and become wholly loosened and detached therefrom, and the said raft thereby set adrift.

That while said petitioner, through its officers and masters of said two tugboats aforesaid, were towing the said raft through the said northerly channel, and while said raft was by reason of their carelessness and unskillfulness towed too [87] closely to said Peacock Spit and into the shallow water, and by reason of the carelessness and negligence of the petitioner and its servants and employees and the navigators of the tugboat "Hercules" and said tugboat "Dauntless" and the unskillful maneuvering in combination of said tugboat "Hercules" and said tugboat "Dauntless" aforesaid, and by reason of the fact that the tow-line on said tugboat "Hercules" and the tow-line on said tugboat "Dauntless" were each improperly maneuvered and handled and allowed to become slackened and then abruptly tightened and were not cared for, or watched, and by reason of the manner in which each of said tugboats

was maneuvered, and because of the fact of insufficient steam for operating the said towing machinery on each of said tugboats, and because of the fact that the said tow-line running from said raft and fastened to the towing machinery on said tug "Dauntless" was not securely or safely fastened to resist the combined strain of the two tugs, and was permitted to unwind therefrom, and that no watch was placed thereon, or care was paid thereto, the said tow-line leading from said raft to the towing machinery in the said tug "Dauntless" paid out and slipped loose from and became wholly detached from said towing machinery and from said tug "Dauntless," and thereupon the said raft drifted over and upon and against said Peacock Spit aforesaid and was broken up and became a total loss to the claimant herein.

That after said tow-line had become released from said tugs, and after said officers and servants of petitioner in charge of said two tugs had turned same loose, and after same had become loose, said petitioner and its servants, masters and officers in charge of said tugboats had ample time *and* [88] and opportunity to secure said raft and tow same safely to said port of San Francisco, but carelessly and negligently refused to and did not do so, but abandoned the same and the same became lost as aforesaid.

This claimant therefore avers that by reason of the failure of the petitioner to perform its said contract to safely tow said raft from the port of Astoria, in Oregon, to the port of San Francisco, in the State

of California, and the loss of said raft in the manner as aforesaid, this claimant became and was damaged in the full sum of Seventy-one Thousand Two Hundred and Forty-nine Dollars and Ninety Cents (\$71,249.90), no part of which has been paid, and the whole thereof is now due, owing and unpaid.

WHEREFORE, claimant prays that the said petition for limitation of liability be dismissed, and that if the same be not dismissed, the claimant in any event be hence dismissed with full right to continue the said suit in the State of Oregon, and that if the Court compel claimant to allege its special cause of action in this suit, the Court to decree the petitioner to be liable to claimant in the sum of Seventy-one *though*, Two Hundred Forty-nine Dollars and Ninety Cents (\$71,249.90), with interest and costs.

W. I. BURNETT,
WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Claimant. [89]

United States of America,
State of California,
City and County of San Francisco,—ss.

L. C. Stewart, being first duly sworn, deposes and says: That he is the Assistant Treasurer of the claimant herein, the Hammond Lumber Company, a corporation, and as such is authorized to make, verify and file the claim hereon on behalf of the said company; that he has read the foregoing claim, knows the contents thereof, and that the allegations of the same are, and each thereof is, to the best of his knowl-

edge, information and belief, true, as stated herein, and there set forth.

L. C. STEWART.

Subscribed and sworn to before me this 24th day of July, 1912.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San
Francisco, State of California.

[Endorsed]: Filed Jul. 30, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [90]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY.

In the Matter of the Petition of the SHIPOWNERS
& MERCHANTS' TUGBOAT COMPANY,
a Corporation, Owner of the Steam Tugs
"DAUNTLESS" and "HERCULES," for
Limitation of Liability.

**Answer of Hammond Lumber Company to Petition
for Limitation of Liability.**

To the Honorable J. J. DE HAVEN, Judge of the
United States District Court for the Northern
District of California, Sitting in Admiralty:

The answer of the Hammond Lumber Company to
the petition of the Shipowners & Merchants' Tug-
boat Company for limitation of liability, respectfully
denies, admits and alleges as follows:

I.

Admits the allegations of article I of said petition.

II.

Admits the allegations of article II of said petition.

III.

Admits the allegations of article III of said petition.

IV.

Admits the allegations of article IV of said petition.

V.

Admits the allegations of the first paragraph of [91] article V of said petition; denies that at the time the said tugs started upon the said tow, the weather, sea and tidal conditions, or any of them, were favorable to a successful towing of the said raft across the said bar upon the route and across the place chosen by the said tugs across the said bar; denies that in making the said tow the said tugs kept in the usual channel down the said river taken by vessels of the draft and tonnage of said log raft; and denies that they passed the usual, and a safe, distance, or either of them, to the northward of the buoys marking the southerly side of the said channel at the entrance to the said river; denies that about the time the said raft was struck the tide began to ebb strong and the sea at the entrance began to make; denies that by reason of said sea and tide, or either of them, said raft became unmanageable and, in that behalf, alleges that if the said raft became unmanageable it became so by reason of choice and of an improper place in said channel, at which there existed a northerly current set across the said channel towards the breakers

off said Peacock Spit; admits that after the said log raft had been taken into the said wrong place in the said channel for crossing the said bar, and because of the same, despite every effort of the said tugs, said raft was gradually turned and swept broadside against said sea until the after end of said raft tailed off toward the breakers on Peacock Spit; admits that the said tugs continued pulling on said raft until the towing hawser pulled off the towing machine; and alleges that it is ignorant as to whether the raft had passed the black buoy marking the northerly side of said channel off Peacock Spit, wherefore it calls for proof of the same, if the same be pertinent; denies that suddenly and without warning, or either of them, said raft pulled the towing hawser off the [92] towing machine on the said tug "Dauntless," and in that behalf alleges that petitioner knew, or should have known, that the towing machine on the said tug "Dauntless" was not strong enough to stand the combined strain of the power of the engines of the tug "Dauntless," in addition to the power of the engines of the tug "Hercules," pulling against the weight of the said log raft; denies that the said log raft pulled the said towing hawser off the said towing machine on the tug "Dauntless," and in that behalf alleges that said raft had no motive power thereon of any kind whatsoever, and that the only motive power pulling the said towing line away from the said tug "Dauntless" was the combined motive power of said tugs "Dauntless" and "Hercules," and that by reason thereof the said towing hawser was pulled off said towing machine and the said log raft driven into the

breakers off of Peacock Spit, and did become a total loss.

VI.

Admits the allegations of article VI of said petition.

VII.

Alleges that it is ignorant of the allegations of article VII, other than the allegation regarding the towing machines of said tugs, wherefore it calls for proof of all of the said allegations, if the same be pertinent; but as to the allegations concerning the towing machines, claimant denies that the said tugs were good, staunch, able and seaworthy vessels, and fully and properly equipped and supplied with towing machines in good order and condition and sufficient for the towing of said raft of piling, as described in the said petition, on said voyage, and in that behalf alleges that the towing machine on the tug "Dauntless" was not strong enough, nor suitable, to withstand [93] the combined strain of the engines of the "Dauntless" and the "Hercules" towing on the said bar, against the weight and draft, and the inertia of the said raft of piling.

VIII.

Denies that the loss of the said raft of piling and all other damages and injuries, whether of persons or of property, done, occasioned and incurred upon said voyage of the said tug "Dauntless" or the said tug "Hercules," or any of them, were done, occasioned and incurred, or any of them without the consent, or privity, or knowledge, or design, or neglect of the petitioner, herein, or any of its directors, or officers,

or servants, or of either of said tugs, and in that behalf alleges that the loss of said raft of piling was occasioned by the neglect of the petitioner herein and of its officers, servants and said tugs.

IX.

That on or about the 9th day of November, 1911, claimant did file its complaint against the petitioner in the Circuit Court of the State of Oregon, for Clatsop County, in that certain suit at common law entitled: "In the Circuit Court of the State of Oregon for Clatsop County. Hammond Lumber Company (a Corporation), Plaintiff, vs. Shipowners and Merchants' Tugboat Company (a Corporation), Defendant"; and that thereafter and prior to the filing of the stipulation herein for the value of the "Dauntless" and of the "Hercules," claimant did file in the said suit its Amended Complaint, and served the same upon petitioner, and the petitioner did file therein its Answer to said Amended Complaint, joining issue with the allegations of the said Amended Complaint; and that said cause did then stand at issue and ready for trial, and does now so stand at issue and ready for trial; that the cause of action set forth and described in the said Amended Complaint [94] filed in the said suit in the State of Oregon is in all respects the same as that set forth in the claim of this claimant on file herein; that said claim is the only claim filed in this proceeding; that said claim is for a sum less than the value of the tugs "Dauntless" and "Hercules" and the sum stipulated to be paid in lieu of their surrender in the stipulation for value of the

said vessels and their freight pending, heretofore filed herein.

V.

Answering article X, claimant denies that the loss of the said raft was solely caused by the breaking away of said raft from the said tug "Dauntless" and was not caused by, nor contributed to by any act or thing done, occasioned or incurred by said tug "Hercules" and that the cause of the loss of the said raft was not participated in by said tug, and denies each and every the said allegations, and in that behalf alleges that it appears herein, and that it is a fact, that the said tug "Hercules" was pulling upon the said tug "Dauntless" at the time that they broke away from the said raft, and that the power of the said tug "Hercules" so applied through the said tug "Dauntless" necessarily contributed to the force which caused the said raft to break away, and further that it appears that the said tug "Hercules" being in the lead of the said tandem of tugs, necessarily participated in choosing the path through which the said combination of tugs and tow passed.

WHEREFORE, your claimant prays that petitioner take nothing by its petition on file herein, and that the same be dismissed, and that claimant be permitted to pursue its said suit in the said State of Oregon, and further prays that in the event this Court hold that it has jurisdiction of the said petition for limitation, that it deny the said limitation; and [95] claimant further prays for its costs herein, and

for such other relief as may to the Court seem meet.

W. S. BURNETT,

WILLIAM DENMAN,

DENMAN & ARNOLD,

Proctors for Claimant.

United States of America,

State of California,

City and County of San Francisco,—ss.

L. C. Stewart, being first duly sworn, deposes and says: That he is the Assistant Treasurer of the claimant herein, the Hammond Lumber Company, a corporation, and as such is authorized to make, verify and file the claim herein on behalf of the said company; that he has read the foregoing answer, knows the contents thereof, and that the allegations of the same are, and each thereof is, to the best of his knowledge, information and belief, true, as stated therein, and there set forth.

L. C. STEWART.

Subscribed and sworn to before me this 24th day of July, 1912.

[Seal]

GENEVIEVE S. DONELIN,

Notary Public in and for the City and County of San Francisco, State of California. [96]

Service admitted July 30, 1912.

PAGE, McCUTCHEN, KNIGHT &
OLNEY,

Proctors for Petitioner.

[Endorsed]: Filed Jul. 30, 1912. Jas. P. Brown,
Clerk. By M. T. Scott, Deputy Clerk. [97]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of SHIPOWNERS &
MERCHANTS' TUGBOAT COMPANY, a
Corporation, Owner of the Steam Tugs
"DAUNTLESS" and "HERCULES," for
Limitation of Liability.

**Objections and Answer of Petitioner to Claim of
Hammond Lumber Company.**

To the Honorable JOHN J. DE HAVEN, Judge of
the United States District Court, for the North-
ern District of California, and to James P.
Brown, Esquire, United States Commissioner
for the Said Court:

Comes now the Shipowners & Merchants' Tugboat
Company, petitioner herein, and objects to the allow-
ance of the claim of the Hammond Lumber Com-
pany heretofore filed herein and presented to the
Honorable James P. Brown, United States Commis-
sioner for said Court, pursuant to the monition is-
sued therein.

And in answer to the allegations of said claim, peti-
tioner admits, denies and alleges as follows:

I.

Petitioner admits the allegations of paragraph I of
said claim.

II.

Petitioner admits the allegations of paragraph II
of said claim. [98]

III.

Answering unto the allegations of paragraph III of said claim, claimant admits that on or about the 10th day of November, 1911, claimant filed its complaint against the petitioner in the Circuit Court for the State of Oregon for Clatsop County, in that certain suit entitled In the Circuit Court of the State of Oregon for Clatsop County, Hammond Lumber Company, a Corporation, Plaintiff, vs. Shipowners & Merchants' Tugboat Company, a Corporation, Defendant, and admits that thereafter and prior to the filing of the stipulation herein for the value of the "Dauntless" and for the "Hercules," claimant filed in said suit its amended complaint, and served the same upon petitioner; and admits that petitioner filed its answer to said amended complaint, joining issue with the allegations thereof; and admits that said cause then stood at issue and ready for trial, and that the same now stands at issue and ready for trial so far as the pleadings are concerned; but denies that the cause of action set forth and described in said amended complaint filed in said suit in the State of Oregon is in all respects as that set forth in the claim herein, except that it admits that in said suit commenced in the State of Oregon, judgment is sought for the value of a raft of piling and its fittings in the same amount as prayed for in this claim. Petitioner admits the claim herein is for a sum less than the value of the tugs "Dauntless" and "Hercules" and the sum stipulated to be paid in lieu of their surrender in the stipulation for value of said vessels, and their freight pending, heretofore filed in this pro-

ceeding; but denies that the claim herein is for a sum less than the [99] value of either of said tugs taken separately, and in that behalf alleges that the petition filed herein prays that this Court may be pleased to determine that no liability exists on the part of petitioner for any act or thing done or occasioned by the tug "Hercules" upon the voyage upon which said raft was lost, and further prays that in case it shall be found that any liability exists on the part of your petitioner for the loss of said raft, that such liability shall in no event be permitted to exceed the value of the tug "Dauntless," which value is less than the amount of the claim herein.

IV.

Answering unto the allegations of paragraph IV of said claim petitioner admits that on or about the 30th day of August, 1911, claimant and petitioner entered into a contract wherein and whereby defendant agreed to and with this claimant in consideration of the sum of \$2,250 to be paid petitioner by claimant upon the completion of the towage thereafter in said paragraph described, to tow for plaintiff, a large raft of piling and spars from Flavel in the port of Astoria, Oregon, to the port of San Francisco, in the State of California; but denies that petitioner on or about said 30th day of August, 1911, or at any other time, agreed with claimant in consideration of the sum of \$2,250, or any other sum, to safely tow for claimant a raft of piling and spars, or of any other kind of material, from Flavel in the port of Astoria, or from any other port, to the port of San Francisco, in the State of California, or to any other place.

Petitioner denies that thereupon, and pursuant to said contract, claimant constructed in a first-class manner a large raft of piling and [100] spars, and completed the same on or about the 8th day of September, 1911, and bound the same together with a large and heavy chains, wire rope cables and other appliances, but in that behalf admits that upon the arrival of its tug "Dauntless" at the port of Astoria, on or about the 9th day of September, 1911, there was delivered to it by claimant, a raft of piling and of spars bound together, so far as the master of said tug could determine, with large and heavy chains, wire rope cables and other appliances.

Petitioner is ignorant as to whether said raft, when completed on said date, or whenever the same was completed, and at the time it became a total loss, contained 592,499 lineal feet of piling and spars, and as to whether the piling and spars in said raft were of the reasonable value of \$59,249.90, and, therefore, demands that strict proof of the same be made. Petitioner is ignorant as to whether said raft as completed, including the piling and spars, and chains, wire cables, shackles, turn buckles, and equipment, was at the times therein alleged in said claim, or at any other time, of the full and reasonable value of \$71,249.90, and, therefore, demands that strict proof of the same be made.

V.

Answering unto the allegations of paragraph V of said claim, petitioner admits that on the 9th day of September, 1911, pursuant to the contract heretofore admitted in paragraph IV of this answer, and in pur-

suance to no other contract, claimant delivered said raft constructed and equipped ready for sea, so far as the master of its tug "Dauntless" could determine, to petitioner at Flavel in the port of Astoria to be by petitioner towed by its [101] tug "Dauntless" from said port to the port of San Francisco, in the State of California, and there delivered to claimant, provided that the said raft arrived at the port of San Francisco, in the State of California; and in that behalf alleges that said raft was to be towed subject to the perils of the sea incident to such towage; and denies that there was any absolute contract to make delivery of said raft. Petitioner admits that it received and took said raft into its possession on the aforementioned date and, pursuant to the contract in this answer admitted, but to no other contract, undertook to tow the same from the port of Astoria, to Oregon, to the port to San Francisco, in the State of California, and there deliver the same to claimant; but denies that it took said raft into its possession, and undertook to safely tow the same from said port of Astoria, to the port of San Francisco, or to deliver said raft in all events to claimant; and in that behalf alleges that the same was to be towed and delivered subject to the exigencies and perils of the sea incident to such towage. Claimant denies that in order to tow said raft, petitioner used and employed its said steam tug "Dauntless" and its said steam tug "Hercules" but admits that each was equipped with a towing machine; and in that behalf alleges that the master of said tug "Dauntless" was unable to procure the services of a bar tug to assist him with said

raft out of the Columbia River, and across the bar at the entrance thereof, and thereupon called to his assistance the tug "Hercules," which then happened to be in the port of Astoria, for the purpose of towing a similar raft to a port in the State of California. Petitioner admits that the said tug "Dauntless" [102] fastened to said raft with a long towing cable, one end of which was wound around the drum of the towing machine on said "Dauntless," and the other end fastened to said raft by means of a long heavy chain bridle; and admits that said tug "Hercules" was fastened to the "Dauntless" with a long towing cable, leading through the forward bits of the "Dauntless" to the towing machine of the "Hercules"; and admits that the two tugs being thus equipped, started to sea with said raft on said date; but denies that petitioner, or said tugs, or either of them, negligently and carelessly conducted itself, or themselves, so that said raft was entirely lost, destroyed and became a total loss to claimant; but admits that said raft became lost and destroyed and a total loss to claimant; and in that behalf alleges that said raft became lost because for reasons unknown to petitioner, said raft stuck while being towed through the channel at the mouth of the Columbia River; that while being so held up, the tide began to ebb strongly, and the sea at the entrance to make, until a tremendous sea was running in across the bar and up the entrance against the increasing ebb tide, and that by reason of said sea and tide, said raft became unmanageable and despite every effort of said tugs was gradually turned and swept broadside

against said sea until the after end of said raft tailed off toward the breakers on "Peacock Spit" where, by reason of said sea and said breakers, said raft finally became lost.

Petitioner admits that at the time it received said raft, and started to tow the same to the port of San Francisco, under the contract hereinbefore admitted, [103] but under no other contract, the weather and conditions on the Columbia River, ocean, and Columbia River bar were favorable; and admits that there was a northward drift of the current in the waters of the Columbia River at the mouth thereof, and in said ocean and across said bar, which said current drifted towards, over and across a large spit on the northerly edge of the channel of said river at the mouth thereof, called and generally known as "Peacock Spit"; and admits that said spit was a dangerous spit near the mouth of said river, and admits that if struck by said raft, or if said raft should come in contact with said spit, or be grounded therein, it would very likely become a wreck, and total loss. Petitioner admits that said facts were known to it, its servants, masters and officers in charge of said tugs; but petitioner denies that the northward drift of said current was usual at the then stage of the tide. Petitioner denies that all of the dangers previously mentioned in said paragraph could have been easily and readily avoided by taking the southerly side of said channel; and denies that it through its servants, masters and officers in charge of said tugs, or in any other manner, carelessly and negligently failed and neglected to, and did not tow said raft by the south-

erly course through said channel, either as aforesaid or otherwise; and denies that it carelessly and negligently attempted to tow said raft along the northerly side of said channel, and over and against the said "Peacock Spit"; and denies that it carelessly and negligently towed said raft so close to said spit that they lost control thereof but admits that said raft broke away from said tugs and drifted upon said spit, and [104] the same became and was a total loss. In that behalf petitioner alleges that in making said tow, said tugs kept in the usual channel down said river taken by vessels proceeding to sea, passing the usual and the safe distance off to the north of the buoys marking the southerly side of said channel at the entrance to said river, and alleges that as it reached channel buoy 4, said raft stuck, and that said tugs were unable to make any headway with it, and that at about the time said raft so stuck, the tide began to ebb strongly, and the sea at the entrance began to make, until a tremendous sea was running in across the bar and up the entrance against the increasing ebb tide, and that by reason of said sea and tide, said raft became unmanageable, and, despite every effort of said tugs, was gradually turned and swept broadside against said sea until the after end of said raft tailed off into the breakers on "Peacock Spit"; and alleges that said tugs continued pulling upon said raft until after it passed the black buoy marking the north side of said channel off "Peacock Spit," when suddenly, and without warning, said raft pulled the towing hawser off the towing machine on the tug "Dauntless," and upon being so

freed, drifted further into the breakers on "Peacock Spit," and became a total loss.

Petitioner denies that at the time said tug "Dauntless" and said "Hercules" took said raft in tow, the towing machine and appliances, and the machine and appliances of the said tug "Dauntless" to which was fastened the towing line leading from the said tug "Dauntless" to the said raft, and with which said tow-line was manipulated, and with which said raft was towed and which was compelled to resist the combined strain of the power of the "Hercules" [105] as well, was, or continued to be thereafter, old, or worn, or useless, or defective, or out of repair, or of insufficient size, or capacity, or strength, and denies that the brake, or brakes, thereof were out of repair, or were incapable of holding, and denies that they were of insufficient strength to hold and tow said raft with the combined strain of said tugs, and denies that said towing machinery and appliances on said tug "Dauntless," were, or each of them was, of insufficient strength to hold and tow said raft; and denies that they were of insufficient strength to hold and tow the same with such combined power and strain through said northerly channel; and in that behalf further denies that said raft was towed through said northerly channel, as alleged in said claim; and petitioner further denies that while said raft was in tow of said tug "Hercules" and said tug "Dauntless," and in the waters of said Columbia River, and near said "Peacock Spit," and in said north channel, that the tow-line payed out and slipped loose from, or became wholly detached from said towing machinery,

and from said tug "Dauntless" by reason of any insufficiency of the towing machinery and appliances, or brake, or brakes; and denies that while said raft was in tow of said tugs in said vicinity alleged as aforesaid, that said tow-line payed out and slipped loose from, or became wholly detached from, said towing machinery, and from said tug "Dauntless" by reason of the towing machinery and appliances to which was fastened the tow-line leading from said raft being of insufficient strength and power to hold and tow said raft with such combined strain of said two tugs; and denies that while said raft was in tow of said two tugs in the [106] vicinity alleged in said claim, that said tow-line payed out and slipped loose from, and became wholly detached from, the said towing machinery and from said tug "Dauntless" because of the tow-line leading from said raft, and by which it was towed, not being fastened to said towing machinery on said tug "Dauntless"; and petitioner further denies that said raft drifted over, and upon, and against said "Peacock Spit" by reason of any of the causes hereinbefore mentioned, and particularly that it did not drift over, or upon, or against said "Peacock Spit" by reason of any insufficiency of the towing machinery and appliances, or brake, or brakes, or by reason of the towing machinery being of insufficient strength and power to hold and tow said raft with the combined strain of said two tugs, or because the tow-line leading from said raft, and by which it was towed, was not fastened to the towing machinery on said tug "Dauntless"; but petitioner does admit that said raft became wrecked, and a total

loss to claimant, except that it denies that it became wrecked, and a total loss to claimant by reason of any of the causes alleged in said claim.

Petitioner further denies that the towing machinery and appliances, or brake, or brakes, were insufficient; and denies that the towing machinery and appliances to which was fastened the tow-line leading from said raft was of insufficient strength and power to hold and tow said raft, with such combined strain of said two tugs; and denies that the tow-line leading from said raft, and by which it was towed, was not fastened to said towing machinery on said tug "Dauntless"; and denies that the tow-line payed out and slipped loose from said towing machinery and from said tug [107] "Dauntless"; and denies that by reason of any of said alleged facts that said raft drifted over, and upon, and against said "Peacock Spit"; and in that behalf petitioner alleges that said towing machinery and appliances were in a seaworthy condition, and of sufficient strength and power to hold and tow said raft, with the combined strength of said two tugs, and alleges that said tow-line was properly fastened to the towing machinery of said tug "Dauntless," and alleges that the same was torn loose from the drum on the towing machinery of said tug "Dauntless" because of the strain resulting from said raft getting into the breakers and grounding on said "Peacock Spit"; and alleges that by reason thereof said raft drifted further over, and upon said "Peacock Spit" where it became wrecked and a total loss to claimant.

Petitioner denies that at, and during all the times,

herein mentioned the said channel over the bar and into said ocean at all points and places, was one mile in width; and denies that it was of sufficient depth to successfully, safely and securely tow said raft through the same to sea, and in that behalf alleges that said raft grounded and stuck while the same was being towed through the original channel taken by vessels proceeding to sea. Petitioner admits that the waters of said channel gradually shallowed near said "Peacock Spit," and admits that at, and around, said "Peacock Spit" the waters are at all times rough when there is any sea rolling in from the ocean, and admits that a heavy sea generally prevails there; but denies that the waters around said spit, are, at all times, very rough, and denies that a heavy sea, [108] at all times, prevails there; and denies that said conditions were well known to petitioner at, and during all, the times in said claim mentioned, except that it admits that it had knowledge of the conditions which generally prevailed on said spit.

Petitioner denies that it, by and through its said masters, officers and navigators of said two steam tugs, or through any other persons, or in any other manner, carelessly and recklessly towed said raft too close to said "Peacock Spit" and into shallow water where said raft could not be successfully managed; and denies that it carelessly and recklessly, or in any other manner, towed said raft where it was in great danger of destruction; and denies that at said time there was sufficient water in the channel of said river to safely tow said raft, for, in that behalf, it alleges that said raft stuck while being towed through the

channel of said river. Petitioner denies that in making said tow, it, through its officers, and agents and masters of said two tugs, or through any other persons, or in any way, failed to, and did not exercise maritime skill; and denies that said two tugs were unskillfully or carelessly maneuvered; and denies that the leading tug did not keep in line so that the power thereof was not permitted to be transferred to said raft; and denies that the tow-lines on each tug were neither looked after, or watched, or cared for; and denies that the tow-lines on each tug were permitted by unskillful maneuvering of said two tugs, or failure to watch the same, to become at times slackened; and denies that while said lines were allowed to become slackened, the full power of each tug with the added velocity of their speed was thrown [109] against the same; and denies that said lines were tightened in any such manner whereby the towing machinery of each was subjected to great and unnecessary strain; and denies that the towing machinery of each was subjected to great and unnecessary strain by *and* such maneuvers on the part of said tugs as alleged in said claim; and denies that the raft having an equal tow was not at all times in control as it should have been by the exercise of ordinary maritime skill; and in that behalf petitioner alleges that said raft was at all times towed by said tugs with the greatest of maritime skill under the supervision of two experienced masters who have towed many rafts out of the Columbia River and across said bar; and, further, in that behalf, alleges that the trouble with said raft arose, as previously alleged herein, by the

same becoming grounded in said channel, and thereby subjected to the destructive forces of the incoming seas against the strong ebb tide, which took the control of said raft away from said tugs.

Petitioner admits that the towing machinery on each tug was operated by steam and required a steady high pressure of steam to successfully operate the same; but denies that such steam pressure was permitted to run down whereby said towing machinery could not be skillfully or properly manipulated; and denies that said towing machinery could not be skillfully or properly manipulated. Petitioner admits that in order to safely tow said raft, with the combined power and strain of both of said tugs, it was necessary that *power and strain of both of said tugs, it was necessary that* the tow-line running from the said raft to said tug "Dauntless" should have been safely and securely fastened to the towing machinery by securely fastening the ends of [110] said tow-line to the flange of the drum on the towing machinery thereof, and winding such tow-line around such drum a sufficient number of times to maintain and keep the same securely fastened thereto, and prevent the same from slipping off; and denies that by reason of carelessness and negligence of petitioner, or at all, such tow-line was not safely, or was not securely, fastened to the flange of said drum, and wound around the same a sufficient number of times to keep the same from slipping therefrom; and in that behalf alleges that said tow-line was securely fastened to the flange of said drum, and was wound around the same a sufficient number of times to keep the same from

slipping therefrom. Denies that in spite of the combined strength of said tugs, or for any other reason, or at all, said tow-line was carelessly and negligently permitted to remain wholly unsecured; and denies that it was permitted to remain wholly unsecured; and denies that it was allowed to pay out until wholly unwound from such drum; and denies that it was held in such a manner that when the strain of the two tugs was placed on such raft, it would slip off and become wholly loosened and detached therefrom, and denies that the said raft was thereby set adrift; and in that behalf petitioner alleges that said tow-line was pulled off from said drum by the power of the breakers on "Peacock Spit" suddenly catching and dragging said raft so that the same became grounded on "Peacock Spit," thereby causing said drum to unwind against the power of said towing machinery, and causing said tow-line to be torn from the flange to which it was fastened.

Petitioner denies that through its officers, and masters of said two tugs, or through any other persons, it [111] towed said raft through the northerly channel; and denies that said raft was by reason of the carelessness or unskillfulness of either petitioner, or its officers, or masters of said tugs towed too close to said "Peacock Spit" and into shallow water; and denies that petitioner, or its servants, or employees, or the navigators of the tugs "Dauntless" and "Hercules" were careless or negligent; and denies that they unskillfully maneuvered said tug "Hercules" in combination with said tug

“Dauntless”; and denies that the tow-line on said tug “Hercules” and the tow-line on said tug “Dauntless” were each, or either of them, improperly maneuvered or handled, or that they were allowed to become slackened, and then abruptly tightened; and denies that they were not cared for, or watched; and denies that either of said tugs was maneuvered in an unskillful or negligent manner; and denies that there was insufficient steam for operating the towing machinery on each of said tugs; and denies that the tow-line running from said raft, and fastened to the towing machinery on said tug “Dauntless,” was not securely or safely fastened to resist the combined strain of the two tugs; and denies that it was permitted to unwind from the drum on the towing machinery of said tug “Dauntless”; and denies that no watch was placed thereon, or that no care was paid thereto; and denies that the tow-line leading from said raft to the towing machinery in the tug “Dauntless” paid out and slipped loose from said tug “Dauntless,” except that it admits that it became detached, as hereinbefore alleged; and further denies that while said petitioner, through its officers, and masters of said two tugs, was towing the said raft through [112] the northerly channel, the tow-line leading from said raft to the towing machinery in the tug “Dauntless” paid out and slipped loose from, or became wholly detached from said towing machinery, or from said tug “Dauntless”; and denies that said raft was by reason of any carelessness or unskillfulness towed too close to “Peacock Spit” and into shallow water, or that by reason

thereof the tow-line leading from said raft to the towing machinery on said tug "Dauntless" paid out, or slipped loose from, or became wholly detached from said towing machinery, or from said tug "Dauntless"; and denies that by reason of any carelessness or negligence of petitioner, or its servants, or employees, or navigators of the tug "Hercules," or the tug "Dauntless," or by reason of any unskillful maneuvering in combination of said tug "Hercules" and said tug "Dauntless," or by reason of the tow-line on said tug "Hercules," and the tow-line on said tug "Dauntless" being improperly maneuvered, or handled, or allowed to become slackened, and then abruptly tightened, or by reason of their not being cared for or watched, or that by reason of the manner in which each of said tugs was maneuvered, or that because of the insufficient steam for operating the said towing machinery on each of said tugs, or that because of the said tow-line running from said raft and fastened to the towing machinery on said tug "Dauntless" not being securely, or safely fastened to resist the combined strain of the two tugs, or because of its being permitted to unwind therefrom by reason of there being no watch placed thereon, or care paid thereto, the said tow-line leading from said raft to the towing machinery in said tug "Dauntless" paid out and slipped loose from and became wholly detached from said towing [113] machinery on said tug "Dauntless."

Petitioner admits that said raft drifted over, and upon, and against said "Peacock Spit" and was broken up and became a total loss to claimant; but

denies that the drifting of said raft over, and upon said spit, was caused in the manner, or by the causes alleged by claimant.

Petitioner denies that its officers, or servants, in charge of said two tugs, or either of them, turned the tow-lines loose; and denies that after said tow-lines had become released from said tugs, or after the same had become loose, petitioner, or its servants, masters of officers in charge of said tugs had ample time or opportunity to secure said raft, and tow the same safely to said port of San Francisco; and denies that said petitioner, or its servants, masters or officers in charge of said tugs carelessly or negligently refused to secure said raft and tow the same safely to the port of San Francisco, or that they abandoned the same; but admits that they did not regain possession of the same, and that said raft became wholly lost, and in that behalf petitioner alleges that at the time said raft broke loose from said tugs, it was in the breakers on "Peacock Spit," with a large and heavy sea rolling in across and breaking upon the bar at the entrance to said river, and that upon said raft breaking loose, it quickly drifted farther into the breakers on "Peacock Spit" out of the reach of said tugs, and petitioner further alleges that in the conditions of the sea prevailing at the time, any attempt on the part of either of said tugs to again pick up said raft, would have been attended with the almost certain destruction of [114] said tugs, and the lives of their masters, officers and crews.

Petitioner denies that it entered into any contract

to safely tow said raft from the port of Astoria, in Oregon, to the port of San Francisco, in the State of California; and denies that there was any failure on its part to perform the contract for said towage into which it had entered, as hereinbefore alleged; and denies that said raft was lost by any failure on the part of petitioner to perform its said contract to tow said raft from the port of Astoria, in Oregon, to the port of San Francisco, in the State of California; and denies that by reason of any failure on its part to perform its contract of towage of said raft, or for any other reason, or by any other cause, claimant became, or was, damaged in the sum of \$71,249.90, or any sum whatsoever. Petitioner is ignorant as to the sum in which claimant was damaged by the loss of said raft, and therefore demands that strict proof of the same be made, if it becomes material in this proceeding. Petitioner admits that no part of said sum has been paid; but denies that the whole, or that any part thereof, is now due, or owing.

Petitioner denies each and every of the remaining allegations of said paragraph.

WHEREFORE, petitioner prays that the claim of the Hammond Lumber Company, claimant herein, may be disallowed and dismissed with costs.

IRA A. CAMPBELL and

PAGE, McCUTCHEN, KNIGHT, OLNEY,

Proctors for Petitioner. [115]

United States of America,
State of California,
City and County of San Francisco,—ss.

W. J. Gray, being first duly sworn, on oath deposes and says:

That he is the Vice-president of the Shipowners & Merchants' Tugboat Company, petitioner herein; that he has read the foregoing objections and answer to the claim of the Hammond Lumber Company filed herein; that he knows the contents thereof and believes the same to be true.

W. J. GRAY.

Subscribed and sworn to before me this 27th day of September, 1912.

[Seal]

FRANK L. OWEN,
Notary Public in and for the City and County of San
Francisco, State of California. [116]

Service of the within Objection, etc., and receipt of a copy is hereby admitted this 27th day of Sept., 1912.

DENMAN & ARNOLD,
Proctors for ———.

[Endorsed]: Filed Sep. 27, 1912. Jas. P. Brown,
Clerk. By C. W. Calbreath, Deputy Clerk. [117]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY.

In the Matter of the Petition of the SHIPOWNERS
& MERCHANTS' TUGBOAT COMPANY, a
Corporation, Owner of the Steam Tugs
"DAUNTLESS" and "HERCULES," for
Limitation of Liability.

**Notice of Motion of the Hammond Lumber Com-
pany, Sole Claimant, for Dismissal of Petition
for Limitation, on the Ground of Want of Juris-
diction.**

To the Petitioner, and to Its Counsel, Messrs. Mc-
Cutchen, Olney and Willard, and to Ira A.
Campbell, Esquire:

You, and each of you, will please take notice that
on Saturday, the 25th day of October, 1913, at the
opening of court on the morning of said day, the
Hammond Lumber Company will move the said
Court for the dismissal of the petition herein, upon
the following grounds appearing in the record of
this case, to wit:

I.

That the record shows that there is but one claim-
ant herein, the Hammond Lumber Company, a corpo-
ration; that the time for the filing of claims has long
since elapsed and that default has been taken against
all other persons claiming damage, loss or injury
arising from the acts set forth in the petition for
limitation; that the said petition sets forth but

one claim for loss, damage or injury arising from the acts described in said petition, to wit, that certain suit filed by the Hammond Lumber Company, in the Circuit Court for Clatsop County, State of Oregon, for the recovery of damages for the loss of the log raft described in said [118] petition; that said suit is a suit to recover the sum of Seventy-one Thousand Two Hundred and Forty-nine and 90/100 Dollars (\$71,249.90), and interest and costs.

II.

That the petitioner herein has enjoined the prosecution of the said suit in Clatsop County, and that claimant, the Hammond Lumber Company, has filed herein its claim for the said sum, viz., Seventy-one Thousand Two Hundred and Forty-nine and 90/100 Dollars (\$71,249.90), with interest and costs, for the said loss of said log raft.

III.

That it appears from the libel herein that the said log raft was towed by two tugs owned by the petitioner, in the following manner, viz., the said log raft was attached to the towing machine of the tug "Dauntless," and the said tug "Dauntless" was attached to the towing machine of the said tug "Hercules," the two tugs towing in tandem, the power of both tugs being exercised on the towing machine of the "Dauntless" and thence through the towing-line of the log raft to the log raft; that the said contrivance of tandem tugs so towing said log raft was a single contrivance as to the application of the towing power of the tugs to the log raft, and as to the course over which the tandem contrivance should

travel in performing the contract of towage described in the said petition, and that therefore the said tandem contrivance of the said two tugs must be surrendered or a stipulation for their value given as a prerequisite to jurisdiction for limitation of liability if said jurisdiction can be acquired in any event.

IV.

That due appraisement of the said two tugs has heretobefore been had and the total value of the same found to be [119] greatly in excess of the claim of your claimant, being the only claim on file herein; that by reason of the fact that there is but one claim on file herein, and that claim for a less amount than the stipulation for the value of the said tugs and their freight pending, said Court has no jurisdiction to hear and determine the question raised by the claim herein or in the said suit in the Circuit Court of Clatsop County, Oregon, viz., as to the negligent navigation and management in the towing of said log raft by the said tandem contrivance of the said two tugs, and that no jurisdiction in this court exists to deprive the said claimant of its right to a jury trial in the said Circuit Court in the suit aforesaid.

V.

That the claimant relies in its said motion to dismiss the said petition for limitation on all pleadings, papers, documents, entries and filings in the record of this proceeding to limit liability.

WHEREFORE claimant moves that the said petition for limitation of liability be dismissed and the

claimant herein recover its costs against the petitioner.

W. S. BURNETT,
WILLIAM DENMAN,
DENMAN & ARNOLD,

Proctors for Claimant. [120]

Due service and receipt of a copy of the within Notice of Motion is hereby admitted this 21st day of October, 1913.

McCUTCHEEN, OLNEY & WILLARD,
Attorney for Petitioner.

[Endorsed]: Filed Oct. 23, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [121]

**[Order of Submission of Motion to Dismiss as to the
Hammond Lumber Co.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 13th day of December, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#15,234.

In re Petition for Limitation of Liability of Tugs
"DAUNTLESS" and "HERCULES."

The motion to dismiss this proceeding as to the Hammond Lumber Company, sole claimant herein, this day came on for hearing, Wm. Denman, Esq.,

appearing for, and Ira Campbell, Esqr., opposing said motion, and after hearing argument by the Court ordered that said motion be submitted to the Court for decision. [122]

**[Order Dismissing Proceeding and Retaining
Jurisdiction.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 10th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#15,234.

In re Petition of SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

The motion to dismiss this proceeding as to the Hammond Lumber Company, sole claimant herein, having been heretofore submitted to the Court for decision, now after due consideration had thereon, the Court files its written opinion and by the Court ordered that this proceeding be and the same is hereby dismissed as to said claimant. Further ordered that the jurisdiction of this proceeding be and the same is hereby retained for the protection of petitioner against any other possible claims. [123]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of The SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

Opinion.

IRA A. CAMPBELL, McCUTCHEN, OLNEY
& WILLARD, Proctors for Petitioner.

DENMAN & ARNOLD, Proctors for Claimant.

The undisputed facts appearing thus far in this proceeding to limit liability are, briefly stated, as follows:

In August, 1911, the Hammond Lumber Company (hereinafter designated claimant) and the Shipowners & Merchants' Tugboat Company (hereinafter designated petitioner), entered into a contract wherein the latter agreed, in consideration of the sum of \$2,250.00, to tow for the former a large raft of piling and spars from Astoria to San Francisco. Pursuant to this contract claimant delivered to petitioner in September, 1911, such raft at Flavel in the port of Astoria to be by petitioner towed to San Francisco. Petitioner for the purpose of towing said raft out of the Columbia River and across the bar thereof, made use of two of its tugs the "Dauntless" and the "Hercules" in the [124] following manner. The tug

“Dauntless” was fastened to the raft with a long towing cable, one end of which was wound around the drum of the towing machinery on said “Dauntless,” and the other end of which was fastened to the raft, and the tug “Hercules” was fastened to the tug “Dauntless” with a long towing cable leading through the forward bitts of the “Dauntless” to the towing machine of the “Hercules.” The two tugs thus in tandem started to sea with the raft, but whether because of the negligence of petitioner as alleged by claimant, or because of the perils of the sea, as claimed by petitioner, the line from the “Dauntless” to the raft parted and the raft became a total loss. Claimant in November, 1911, commenced an action against petitioner in the Circuit Court of the State of Oregon for Clatsop County for \$71,249.90, for the loss of said raft, alleging that such loss was due to the negligence of petitioner. This action is now, and was, before the filing of the stipulation hereinafter mentioned, at issue upon the amended complaint of claimant and petitioner’s answer thereto. On February 27th, 1912, petitioner filed in this Court its petition for limitation of liability, but praying that if such liability be found to exist it be limited to the value of the tug “Dauntless,” yet also offering to deliver the tug “Hercules” in case it be found that this tug also is liable, and praying further that all claims arising against petitioner by reason of said voyage be heard and determined in this court; and that all other proceedings be stayed. Appraisement having been duly made of the two tugs the value of the “Dauntless” was fixed at \$45,000.00, [125] and

of the "Hercules" at \$70,000, for which values a stipulation was filed by petitioner. No person other than claimant having made any claim herein, in due time, and on July 12th, 1912, an interlocutory decree of default against all persons other than claimant was duly entered. Claimant now moves the Court to dismiss the petition for limitation of liability as to it, and for leave to prosecute its action in the Oregon State Court, upon the grounds: 1. That there is only one claim made herein; and 2. That that claim is for much less than the appraised value of the tugs "Dauntless" and "Hercules," and that for these reasons there is no occasion for limitation of liability, and no reason for depriving claimant of its common-law remedy of trial by jury. Petitioner resists the motion, insisting that as this court has rightly acquired jurisdiction of this proceeding and of claimant, it should retain it until the whole matter is disposed of, and insisting further that in no event can the tug "Hercules" be held liable; that as the value of the "Dauntless" is only \$45,000, while claimant seeks to recover \$71,249.90, petitioner's liability should be limited to said sum of \$45,000, and therefore this Court must retain and dispose of the whole question.

The statute providing for limitation of liability is designed for the protection of the shipowner, and the object of proceedings thereunder is to afford such protection by preventing recoveries in excess of the value of the vessel and freight pending, and distributing such value in proper proportions where [126] there are more claimants than one. Where there is but one claimant, however, and his claim is for much

less than the amount to which, the liability of the shipowner may properly be limited, there is neither danger of recovery above such amount, nor necessity for distribution among a number of claimants. If the tug "Hercules" is equally liable with the tug "Dauntless" for the loss of the raft in question, we have the case here of a single claimant for an amount much less than that to which petitioner's liability may in any event be limited.

Both tugs being engaged in the same venture, at the time of the disaster, are equally liable, if there be liability at all, though the tug "Dauntless" was the only one attached directly to the raft.

The Columbia, 73 Fed. 237.

Thompson Towing Co. vs. McGregor, 207 Fed. 212.

Under the peculiar circumstances of the present proceedings I am of the opinion that petitioner's protection does not require that this court should further restrain claimant from prosecuting its action in the State Court, and that as to said claimant the proceedings should be dismissed. The same result might perhaps, be attained by dissolving the restraining order in so far as it applies to claimant, but I am satisfied that as claimant has moved to dismiss, instead of for a dissolution of the restraining order, its motion should be granted. The proceeding as to claimant is, therefore, dismissed. The Court, however, will retain jurisdiction of the proceedings for the [127]

protection of petitioner against any other possible claims.

January 10th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 10, 1914. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [128]

[Order Staying Proceedings for Twenty Days.]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 12th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

#15,234.

In re Petition of SHIPOWNERS AND MERCHANTS' TUGBOAT COMPANY, a Corporation, Owners of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

On motion of Ira Campbell, Esqr., attorney for petitioner herein, by the Court ordered that proceedings in accordance with the opinion filed herein, be and the same are hereby stayed for a period of twenty days from this date. [129]

*In the United States District Court, for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of the SHIPOWNERS
& MERCHANTS' TUGBOAT COMPANY,
a Corporation, Owner of the Steam Tugs
"DAUNTLESS" and "HERCULES," for
Limitation of Liability.

Decree.

The motion of the Hammond Lumber Company, a corporation, to dismiss the petition herein, in so far as it applies to the Hammond Lumber Company, coming on duly to be heard, and it appearing that the claim of the Hammond Lumber Company is the only claim on file in this proceeding; and it further appearing that after due notice published and reserved, as required by law, a default has been entered herein against all persons, if any there be, entitled to file a claim in this proceeding; and it further appearing that the size of the fund for the payment of the sole claim herein filed, to wit, that of the Hammond Lumber Company, exceeds the claim of the Hammond Lumber Company:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the said petition be dismissed as to the said Hammond Lumber Company, claimant herein, and that said petitioner take nothing against said Hammond Lumber Company by the said petition; and,

IT IS FURTHER ORDERED, ADJUDGED

AND DECREED, that said Hammond Lumber Company do have and recover its costs herein; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the above order and decree shall in no wise affect the rights of the [130] petitioner here acquired, if any there be, against any other persons entitled to file claims herein, if any there be.

Dated January 13th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 13, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [131]

*In the District Court of the United States, in and for
the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of the SHIPOWNERS
& MERCHANTS' TUGBOAT COMPANY,
a Corporation, Owner of the Steam Tugs
"DAUNTLESS" and "HERCULES," for
Limitation of Liability.

**Order Staying Proceedings [to and Including
February 7, 1914].**

IT IS HEREBY ORDERED that all proceedings in the above-entitled matter be and the same are hereby stayed five days from and after the second day of February, 1914.

Dated January 29, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 29, 1914. W. B. Maling,
Clerk. By Francis Krull, Deputy Clerk. [132]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of THE SHIPOWN-
ERS & MERCHANTS' TUGBOAT COM-
PANY, a Corporation, Owner of the Steam
Tugs "DAUNTLESS" and "HERCULES,"
for Limitation of Liability.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to
Claimant and Respondent, Hammond Lumber
Co., and to W. S. Burnett, Esq., and Messrs.
Denman & Arnold, Its Proctors:

You and each of you will hereby please take notice
that The Shipowners and Merchants' Tugboat Com-
pany, a corporation, owner of the steam tugs "Daunt-
less" and "Hercules," and petitioner herein, hereby
appeals from the final decree made and entered
herein on the 13th day of January, 1914, granting
said proceeding as to said Hammond Lumber Com-
pany, to the next United States Circuit Court of Ap-
peals for the Ninth Circuit, to be holden in and for
said Circuit, at the City and County of San Fran-
cisco.

Dated February 5th, 1914.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Said Petitioner. [133]

Service of the within Notice of Appeal and receipt of a copy is hereby admitted this 5th day of February, 1914.

WILLIAM DENMAN,
W. S. BURNETT,
DENMAN AND ARNOLD,

Proctors for Claimant, Hammond Lumber Company.

[Endorsed]: Filed Feb. 5, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [134]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of THE SHIPOWN-
ERS & MERCHANTS' TUGBOAT COM-
PANY, a Corporation, Owner of the Steam
Tugs "DAUNTLESS" and "HERCULES,"
for Limitation of Liability.

Assignment of Errors.

Now comes the Shipowners & Merchants' Tugboat Company, a corporation, petitioner in the above-entitled action, and appellant herein, and says:

That in the record, opinion, decision and final decree in said cause, there is manifest and material error, and said appellant now makes and files and presents the following assignment of errors on which it relies, to wit:

(1) The District Court erred in rendering the decree herein of date, the 13th day of January, 1914,

against the steam tugs “Dauntless” and “Hercules” and said petitioner, the Shipowners & Merchants’ Tugboat Company;

(2) The District Court erred in dismissing the petition because only one claim had been presented;

(3) The District Court erred in dismissing the petition as to the Hammond Lumber Company;

(4) The District Court erred in holding that the tug “Hercules” must be surrendered; [135]

(5) The District Court erred in holding that each tug, being operated by its own master independently and being propelled by its own power, must be surrendered;

(6) The District Court erred in holding both tugs to be one vessel;

(7) The District Court erred in holding that the tugs “Dauntless” and “Hercules” were equally liable, if there be liability at all;

(8) The District Court erred in determining from the pleadings that, if there be liability at all, both tugs were equally liable;

(9) The District Court erred in not proceeding to a trial and a determination of the issues;

(10) The District Court erred in not proceeding to determine which tug was in fault, if either was in fault, after having acquired jurisdiction of all the parties.

(11) The District Court erred in not proceeding to determine, after trial, the liability of the petitioner for any act of either or both of said tugs, and if liability was found to exist, in not thus proceeding to

determine the right of petitioner to a limitation of its liability therefor.

Dated March 21, 1914.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Petitioner and Appellant.

[Endorsed]: Filed Mar. 20, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [136]

**[Stipulation and Order Enlarging Time to March
22, 1914, to Print and File Record in Appellate
Court.]**

*In the United States District Court in and for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of THE SHIPOWN-
ERS & MERCHANTS' TUGBOAT COM-
PANY, a Corporation, Owner of the Steam
Tugs "DAUNTLESS" and "HERCULES,"
for Limitation of Liability.

IT IS HEREBY STIPULATED AND AGREED
that the time for printing the record and filing and
docketing this cause on appeal in the United States
Circuit Court of Appeals may be extended fifteen
days.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Petitioner.

WILLIAM DENMAN,

W. S. BURNETT,

DENMAN & ARNOLD,

Proctors for Claimant.

Pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is, hereby enlarged and extended fifteen days from and after the 7th day of March, 1914.

M. T. DOOLING,
District Judge. [137]

[Endorsed]: Filed Mar. 7, 1914. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [138]

[Stipulation and Order Extending Time to March 25, 1914, to Print and File Record in Appellate Court.]

In the United States District Court in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,234.

In the Matter of the Petition of THE SHIPOWNERS & MERCHANTS' TUGBOAT COMPANY, a Corporation, Owner of the Steam Tugs "DAUNTLESS" and "HERCULES," for Limitation of Liability.

IT IS HEREBY STIPULATED AND AGREED that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals may be extended to and including the 25th day of March, 1914.

Dated March 19, 1914.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Petitioner.

WILLIAM DENMAN,

W. S. BURNETT,

Proctors for Claimant. [139]

Pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby enlarged and extended to and including the 25th day of March, 1914.

Dated: March 21st, 1914.

M. T. DOOLING,

District Judge.

[Endorsed]: Filed Mar. 20, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [140]

**[Certificate of Clerk U. S. District Court to
Apostles.]**

United States of America,
Northern District of California,—ss.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and hereunto annexed one hundred and forty (140) pages, numbered from 1 to 140, inclusive, contain a full, true and correct transcript of the records, documents, etc., as the same now appear on file and of record in the

Clerk's Office of said District Court, in the cause entitled "In the Matter of the Petition of The Shipowners and Merchants' Tugboat Company, a Corporation, Owner of the Steam Tugs 'Dauntless' and 'Hercules,' for Limitation of Liability, No. 15,234." Said transcript is made up pursuant to and in accordance with "Praeceptum for Apostles on Appeal" (a copy of which is embodied in this transcript), and the instructions of Messrs. McCutchen, Olney and Willard, and Ira A. Campbell, Esquires, proctors for petitioner and appellant.

I further certify that the cost of preparing and certifying the foregoing Transcript of Appeal is the sum of Sixty-seven Dollars and Seventy Cents (\$67.70), and that the same has been paid to me by proctors for petitioner and appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 25th day of March, A. D. 1914.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [141]

[Endorsed]: No. 2388. United States Circuit Court of Appeals for the Ninth Circuit. The Shipowners and Merchants' Tugboat Company, a Corporation, Owner of the Steam Tugs "Dauntless" and "Hercules," Appellant, vs. Hammond Lumber Company, a Corporation, Appellee. In the Matter of the Petition of the Shipowners and Merchants' Tugboat

130 *The Shipowners & Merchants' Tugboat Co.*

Company, a Corporation, Owner of the Steam Tugs
"Dauntless" and "Hercules," for Limitation of Lia-
bility. Apostles. Upon Appeal from the United
States District Court for the Northern District of
California, First Division.

Received and filed March 25, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2388

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SHIPOWNERS AND MERCHANTS'
TUGBOAT COMPANY (a corporation),
owner of the Steam Tugs "Dauntless" and
"Hercules",

Appellant,

vs.

HAMMOND LUMBER COMPANY
(a corporation),

Appellee.

In the Matter of the Petition of the Shipowners and Merchants'
Tugboat Company (a corporation), owner of the Steam Tugs
"Dauntless" and "Hercules", for limitation of liability.

BRIEF FOR APPELLANT.

Statement of Facts.

On the 9th day of September, 1911, at Astoria, Oregon, the Hammond Lumber Company, appellee (claimant below), delivered a large raft of piling to the master of appellant's tug "Dauntless", to be towed

to the port of San Francisco. The tug was made fast to the raft by means of a long steel towing hawser attached to the towing machine of said tug, and the hawser was fastened to the raft with a heavy chain attached to the raft by the employees of appellee constructing same.

The master of the tug "Dauntless" being unable to procure the services of a bar tug to assist him out of the Columbia River and across the bar, called to his aid appellant's tug "Hercules". The "Hercules" then made fast to the tug "Dauntless" by means of a long steel towing hawser attached to the towing machine on the "Hercules" and to the forward bitts of the "Dauntless". Upon being made fast as aforesaid, the tug proceeded with said raft down the river from Astoria and continued, during the afternoon, through the channel at the entrance of said river toward the open sea. At the time the tow started, and for the greater part of the afternoon, the sea and weather conditions were favorable to a successful towing of said raft across the bar, and, in making said tow, said tugs kept in the usual channel down said river taken by vessels proceeding to sea, passing the usual and a safe distance off and to the northward of the buoys marking the southerly side of the said channel at the entrance of said river. As said raft reached channel buoy No. 4, it stuck and said tugs were unable to make any headway with it, and at about that time the tide began to ebb strong, and the sea at the entrance began to make until a tremendous sea was running in across the bar and up the entrance

against the increasing ebb tide. By reason of said sea and tide, the raft became unmanageable.

Said raft was gradually turned and swept broadside against said sea until the after end of said raft tailed off toward the breakers on Peacock Spit. Said tug continued pulling until after it passed the black buoy marking the northerly side of said channel off Peacock Spit, when suddenly and without warning said raft pulled the towing hawser off the towing machine on the tug "Dauntless", and upon being so freed, drifted into the breakers on Peacock Spit, and became a total loss.

Thereafter, in November, 1911, appellee commenced an action in the Circuit Court of the State of Oregon for Clatsop County against appellant to recover \$71,249.90, alleged to have been the value of said raft of piling and its equipment. In due course, appellant answered in said cause denying all liability for the loss of said raft, and thereafter, filed in the District Court below its petition for limitation of liability, as authorized by the Revised Statutes of the United States and the rules of the Supreme Court governing such proceedings.

In said petition for limitation of liability, the circumstances under which said raft was lost were set forth, and all liability therefor denied. It was further alleged that the loss of said raft, and all other damages and injuries whether to persons or property done, occasioned, and incurred upon the voyages of said tug "Dauntless" and of said tug "Hercules" were done,

occasioned and incurred without the consent or privity or knowledge or design or neglect of petitioner (appellant) or of any of its directors or officers or servants, or of either of said tugs. Appellant claimed the right to contest its liability and the liabilities of each of said tugs "Dauntless" and "Hercules" for any injuries, losses and damages, whether to persons or to property caused, occasioned or incurred upon said voyages, and particularly for the loss of said raft of piling, under Sections 4282 to 4289, inclusive, of the Revised Statutes of the United States and the Acts amendatory thereof, and offered to give its stipulation or stipulations, with sufficient sureties, conditioned for the payment into court of the value of said tug "Dauntless", and said tug "Hercules", if required, as they were immediately after the termination of said voyages upon which said raft was lost, with interest thereon, together with their and each of their freight pending, except that the offer to give a stipulation for the payment into court of the value of the tug "Hercules", and her freight pending, was under protest for the reason that if there was any liability on the part of appellant for the loss of said raft, it was solely because of the breaking away of said raft from said tug "Dauntless", and was not because of, or contributed to by, any act or thing done, occasioned or incurred by said tug "Hercules", or any of her officers or crew, and because the loss of said raft was not participated in by said tug.

It was accordingly prayed in said petition that an order of appraisement be had of the values of the

said tugs "Dauntless" and "Hercules", and of their freight pending, if any, at the close of their voyages, and that stipulations or undertakings might be given by appellant, with sureties, conditioned for the payment into court of the appraised value whenever the same should be ordered; and it was further prayed that, upon the filing of such stipulations, a monition issue against the Hammond Lumber Company, appellee, and all other persons claiming damages by reason of injuries to persons or property occurring or arising upon said voyages, or resulting from the loss of said raft, citing them to appear before said court and there make due proof of their respective claims, as to all of which claims appellant gave notice that it would contest its liability and the liabilities of said tugs "Dauntless" and "Hercules", and particularly the liability of said tug "Hercules" independently of the limitation of liability claimed under the Revised Statutes.

It was further prayed that the court determine that no liability existed on the part of appellant, or said tug "Dauntless" for any act or thing done or occasioned by said tug upon said voyage on which said raft was lost, and particularly that no liability existed on the part of appellant or said tug "Hercules" for the loss of said raft, and that the court would be pleased to release the stipulation for value of said tug "Hercules", and her freight, if any, pending, for the reason that neither said tug, nor her officers or crew, participated in the loss of said raft. It was further prayed, if the court found that any liability existed

on the part of appellant by reason of injuries to persons, or loss of or damage to property done, occasioned or incurred upon said voyages, and particularly for the loss of said raft, that said liability should in no event be permitted to exceed the value of said tug "Dauntless", and her freight, if any, pending; and, if the court should find that liability existed on the part of said tug "Hercules", or of appellant for any act or neglect of said tug, that such liability should in no event be permitted to exceed the value of said tugs "Dauntless" and "Hercules" and their freights, if any, pending, at the close of their respective voyages upon which said raft was lost, as such values might be determined by the appraisement of appellant's interest therein; and that the money secured to be paid into the court should, and might, after payment of costs and expenses therefrom, be divided pro rata among the several claimants in proportion to the amount of their respective claims.

The issuance of a restraining order was requested, restraining said Hammond Lumber Company from further prosecuting said suit commenced in the Circuit Court of the County of Clatsop, State of Oregon, and restraining all other persons from prosecuting any suits against said petitioner or said tugs, or either of them, save only in said District Court in respect to the loss of said raft, on any and all claims arising upon said voyages.

Thereafter, an order was entered referring said matter to the Honorable James P. Brown, United States Commissioner, for the making of due appraise-

ment of the value of the interest of petitioner in said tugs "Dauntless" and "Hercules" at the close of their respective voyages, upon which said raft was lost, together with the amount of their freight pending. Notice of said appraisement was given to said Hammond Lumber Company, and, thereafter, in due course said appraisement was had and the report of said commissioner duly and regularly filed, appraising the value of the interest of petitioner in said tug "Dauntless" at the sum of \$45,000, and in said tug "Hercules" at the sum of \$70,000. Said report was approved and the order entered on the 29th day of March, 1912, directing said petitioner (appellant) to file with said court undertakings, with good and sufficient sureties, in the respective sums of \$45,000 and \$70,000, with interest thereon from the 9th day of September, 1911, conditioned for the payment into court by said petitioner of the values of the said tugs "Dauntless" and "Hercules" as determined by said commissioner. Stipulations in accordance with said order were duly and regularly filed by said petitioner, and, thereafter, pursuant to an order of said court, a monition was issued citing all corporations, person or persons, claiming damages for any loss, damage or injury occurring or arising upon said voyage of said steam tugs "Dauntless" and "Hercules", leaving the port of Astoria, Oregon, on the morning of the 9th of September, 1911, and particularly citing the Hammond Lumber Company (appellee), claiming damages for the loss of said raft of piling, to appear before said court, and make due proof of their respective

claims before the Honorable James P. Brown, United States Commissioner at his office, on or before the 10th day of July, 1912, and to appear and answer the allegations of the libel and petition. Said monition was served upon the Hammond Lumber Company, and was duly and regularly posted and published as required by law and the order of said District Court, and no claimants appearing in response thereto, save said Hammond Lumber Company, an interlocutory decree of default was thereafter entered on the 12th day of July, 1912, ordering, adjudging and decreeing the default of all persons and corporations, save and except said Hammond Lumber Company, having any claims against said petitioner, or said tugs "Dauntless" and "Hercules", for any loss, damage or injury occurring or arising upon said voyages.

Thereafter, on the 30th day of July, 1912, said Hammond Lumber Company filed its claim in said proceedings, claiming the value of said raft in the sum of \$71,249.90. An answer was filed by said Hammond Lumber Company to said petition for limitation of liability, admitting and denying the allegations of said petition, and particularly denying that the loss of said raft of piling and all other damages and injuries whether of persons or of property done, occasioned and incurred upon said voyage by said tug "Dauntless" or said tug "Hercules", or any of them, were done, occasioned and incurred without the consent, or privity, or knowledge, or design, or neglect of petitioner, or any of its directors, officers or servants, or of either of said tugs, and in that

behalf alleged that the loss of said raft of piling was occasioned by the neglect of petitioner and of its officers, servants and said tugs. The institution, on or about the 9th day of November, 1911, of said action in the Circuit Court of the County of Clatsop, State of Oregon, was alleged, and a denial interposed that the loss of said raft was solely caused by the breaking away of said raft from said tug "Dauntless", and that it was not caused or contributed to by any act or thing done, occasioned or incurred by said tug "Hercules", and that the cause of the loss of said raft was not participated in by said tug; and in that behalf said answer alleged that it was a fact that said tug "Hercules" was pulling upon said tug "Dauntless" at the time they broke away from said raft, and that the power of said tug "Hercules" so applied to said tug "Dauntless" actually contributed to the force which caused said raft to break away, and further that it appeared that said tug "Hercules", being in the lead of said tandem of tugs, necessarily participated in choosing the path through which the said tugs and tow passed.

It was prayed in said answer that the petitioner take nothing by its petition, and that the same should be dismissed, and that claimant be permitted to pursue its suit in said state court, and that in the event that the court should hold that it had jurisdiction of the said petition for limitation, that it deny said limitation. Exceptions to the petition were filed alleging the insufficiency of the petition to give the court jurisdiction for adjudicating the limitation of liability on

the ground that it failed to show that more than one person was damaged by reason of the acts set forth in said petition; and on the further ground that the petition failed to show that the value of the said tugs, or the value of either of them, was less than the loss, damage or injury done.

Thereafter, appellant filed its objection and answer to the claim of said Hammond Lumber Company, as by the rules provided.

Subsequently, on the 23rd day of October, 1913, said Hammond Lumber Company filed a motion with said court, praying for the dismissal of the petition upon the ground that there was but one claimant, the Hammond Lumber Company, and that default had been taken against all other persons claiming damage, loss or injury arising from the act set forth in the petition for limitation, and that said petition set forth but one claim, to wit, that certain suit filed by the Hammond Lumber Company, in the Circuit Court of the County of Clatsop, State of Oregon, wherein recovery was sought in the sum of \$71,249.90. Said motion stated the further ground that it appeared from the petition that the raft was towed by two tugs in the manner described in said answer of said Hammond Lumber Company, and alleged that said two tugs must be surrendered, or a stipulation for their value given, as a prerequisite for limitation of liability if jurisdiction could be acquired in any event. It further set forth that due appraisement of said tugs had been made, and that the total value of the same was greatly

in excess of the claim of said Hammond Lumber Company, and alleged that by reason of the fact that but one claim for less amount than the stipulation for the value of said tugs, and their freight pending, had been filed in said court, that the court was without jurisdiction for hearing and determining the question raised by the claim, or in the said suit pending in the Circuit Court of Clatsop County, State of Oregon.

Thereafter at a stated term of the District Court on the 10th day of January, 1914, said motion to dismiss came on for hearing before the Honorable M. T. Dooling, judge of said court, and oral argument being had, said court thereafter rendered its opinion directing the dismissal of said limitation proceedings as to said Hammond Lumber Company, but retaining jurisdiction of the proceedings for the protection of the petitioner against any other possible claims. A decree was entered in accordance with said opinion, and, thereafter, this appeal was duly and regularly prosecuted from said decree.

SPECIFICATIONS OF ERROR.

Errors have been assigned, in the apostles on appeal, to the decree of the District Court dismissing the petition as to the Hammond Lumber Company.

The assignment of errors will be discussed, for convenience, under the following specifications:

I.

The court erred in dismissing the petition as to the Hammond Lumber Company, appellee, because only one claim had been presented. (Assignments 1, 2, 3.)

II.

The court erred in holding both tugs must be surrendered, and in dismissing the petition as to the Hammond Lumber Company, appellee, because the values of the two tugs exceeded the amount of appellee's claim. (Assignments 1, 4, 5, 6 and 7.)

III.

The court erred in holding that both tugs were equally liable, if any liability existed at all, for the loss of said raft, and in dismissing the petition as to the Hammond Lumber Company, appellee, because the combined values of said tugs exceeded the claim of appellee. (Assignments 1, 2, 5, 6, 7, 8.)

IV.

The court erred in dismissing the petition as to the Hammond Lumber Company, appellee, because only one claim had been presented, of less amount than the combined values of said tugs, without first proceeding to trial, and determining whether both of said tugs were, or only one of said tugs was, liable, if liability existed at all, for the loss of said raft. (Assignments 1, 4, 5, 6, 7, 8, 9, 10, 11.)

Argument.

I.

APPELLANT HAD THE RIGHT TO INVOKE THE SPECIAL PROCEEDING FOR LIMITATION OF LIABILITY IN THE DISTRICT COURT NOTWITHSTANDING BUT ONE CLAIM WAS PRESENTED. (Specification 1.)

The right of a shipowner to invoke the special proceeding for limitation of liability provided by Sections 4282 to 4289 of the Revised Statutes of the United States, and acts amendatory thereof, and by the rules of the Supreme Court, where only one claim is presented, on which suit at law has been already instituted at the time of the filing of the petition, has been both denied and affirmed, but the weight of authority and the accepted practice supports the right and duty of the District Court to entertain the special proceeding.

The question, apparently, first came before the courts in 1892, in

The Rosa, 53 Fed. 133,

wherein Judge Brown dismissed a petition on behalf of the New York Harbor Tugboat Company. The tugboat company filed its petition after an action for wrongful death had been instituted against it in one of the state courts by Eliza Burns, administratrix of the estate of her husband.

The court held that it was apparent from the petition that but one claim could arise, and that Section 9 of the Judiciary Act of 1789,

“saving to suitors in all cases the right to a common law remedy where the common law is competent to give it”,

forbade any interference with the action in the state court, when the whole subject matter and all the rights of both parties could there be perfectly adjudicated and preserved. He pointed out that the statutory limitation could be obtained by setting up in the answer the value of the steamer, and thereby making it one of the issues in the case. It is to be noted, however, that the ruling is to be expressly conditioned upon the possibility of a perfect adjudication and preservation of the rights of both parties in the ordinary course of a common law suit. The court was careful not to make a ruling to include all cases in which there was only one claim, and suggested that circumstances might possibly arise in which no proper authority existed for the shipowner to avail himself of the statutory defense in a common law suit upon a single claim. This qualification is of importance when attempt is made to apply the decision to the case at bar as made out by the petition, for if the later falls within the possible exception which Judge Brown admitted might exist, the decision is without weight.

The case was followed by Judge Brown in

The Eureka, No. 32, 108 Fed. 672,

where he strongly adhered to his former decision. There, again, the primary reason advanced for his conclusion was that the common law afforded an adequate remedy whereby liability could as well be limited by an order in the state courts as by special proceedings. But even then, he admitted that a common law remedy was not competent to give relief,

if the appointment of a trustee was necessary, though he apparently restricted the necessity of a trustee to a case where several claims required a pro rata contribution. It is to be noted, however, that the only provision made for a trustee is the transfer to him of the petitioner's interest in the vessel, if the latter elects to make the transfer, rather than giving a stipulation for value. (Admiralty Rule 54, Rev. St. Sec. 4285.) Inasmuch as the right of surrender is conferred upon a shipowner, it is difficult to see, under Judge Brown's admission, how the common law can afford the relief granted by the statute and the rules. His admission of the inability of a common law court to appoint a trustee, is tantamount to saying that if a shipowner elects that relief, the special proceeding is necessary, as the rules confer upon him the privilege of surrender. The right to the special proceeding is inviolate, and is not dependent upon the number of claims against which limitation is sought.

The third and last decision denying the right to the special proceeding was that of

The Lotta, 150 Fed. 219,

decided by Judge Brawley, of the District Court for the District of South Carolina, in 1907. *It was expressly held that the District Court had jurisdiction of the question of the right to limit.*

In that case an action had been commenced in the state court by one Vose, as administrator, against the owner of the "Lotta", to recover damages for the death of his son. Judge Brawley followed *The Rosa*

and *The Eureka No. 32*, rather than those courts which had arrived at an opposite conclusion. There, as in *The Rosa*, and *The Eureka No. 32*, a claim was in question over which the admiralty court had no original jurisdiction, a fact recognized and taken into consideration by both Judge Brawley and Judge Brown. While the decision followed the ruling in *The Rosa* and *The Eureka No. 32*, there is found, however, in the concluding paragraph of Judge Brawley's opinion, this significant qualification to which we shall later refer:

"The petition, however, will not be dismissed; for, if it should hereafter appear in the course of the proceedings in the state court that a question is raised as to the right of petitioner to a limited liability, this court has exclusive cognizance of such a question."

The foregoing are the only decisions refusing to entertain special limitation proceedings where but one claim existed, on which a prior suit had been instituted in a common law court. In none of them, however, is the rule laid down as broadly applicable to all cases. In fact, in each decision, a limitation is to be found, for both Judge Brawley and Judge Brown expressly based their opinions upon the certainty of an adequate remedy at common law which would as effectually secure the statutory limitation to the shipowner as the special proceeding provided by the statutes and the rules of the Supreme Court. Unless, therefore, the case at bar comes squarely within the narrow limits of those decisions, they are

not, even though sound in principle as applied to the special circumstances of those cases, controlling here.

The weight of authority, however, upholds the right of a shipowner to invoke the special proceeding for limitation, even though but one claim exists, to say nothing of the recognition of such right where the common law fails to give an adequate remedy, or the right of limitation is questioned, or where the claim, purely maritime in character, is one over which the District Court would have jurisdiction in the first instance.

The earliest reported decision is that of the Circuit Court of Appeals for the First Circuit in

Quinlan v. Pew, 56 Fed. 111,

affirming the decision of the District Court.

One Quinlan, who was on a lay on the fishing schooner "Essex", was injured in the course of his duties by the giving way of certain parts of the vessel's rigging. Suit was brought in the United States Circuit Court, and, thereafter, limitation proceedings were instituted by the owners in the District Court. The Circuit Court of Appeals, speaking through Circuit Judge Putnam, frankly said that it could not accept the ruling laid down in *The Rosa*, supra, denying the jurisdiction of the admiralty courts to entertain the proceedings provided by statute and by the Supreme Court rules, where but one claim existed. The court reviewed the statutes and Supreme Court rules, analyzing them as did Judge Brown, but reached an opposite conclusion as to their exclusive

operation. That portion of the opinion devoted to the discussion of the question is so pertinent that we quote it at length:

“The appellant also objects that it appears from the proceedings that the claim of Quinlan is the only outstanding one against the vessel, or owners as owners, and that this fact brings the case within *The Rosa*, 53 Fed. Rep. 132, where it was held that the statute limiting liability does not apply under such circumstances. As already said, the state of the record is as claimed by the appellant; yet this court cannot accept the rule laid down in *The Rosa*. The statute right to surrender the vessel to a trustee appointed by any court of competent jurisdiction, which in maritime matters necessarily includes the admiralty courts, and to be thus relieved from liability, is protected both by the letter of the statute and by its reason, whether there are numerous claims outstanding, or but one; and the right to have the vessel appraised under admiralty rule 54 is necessarily coextensive with the right to surrender. Indeed, under admiralty rule 56, the owners may bring the entire contest into the admiralty court, even though they finally establish a contention that there are no valid claims whatever. The rule in *The Rosa* is quite impracticable, as it is frequently impossible for the owners of vessels navigating foreign seas, remote from their personal control, to be assured as to the extent to which they may be subject to liens and claims of various kinds. The original act of 1851 (section 4) uses both the plural and singular; and there is no such change found in the Revised Statutes as would justify the court in holding that congress intended any substantial innovation. Indeed the Revised Statutes (section 4285) use both the plural ‘claimants,’ and the singular, ‘person,’ thus bringing forward the plural and singular of the original act. The statute was intended for the encourage-

ment of commerce, and would not receive its full effect, to the extent given by the Supreme Court in *Providence & New York Steamship Co. v. Hill Manuf'g Co.*, 109 U. S. 578, 588, 589, 3 Sup. Ct. Rep. 379, 617, if the owner of a vessel or wreck, under the circumstances of there being but a single claim outstanding, large enough to absorb the entire vessel or her salvage, could be compelled, on the verdict of a jury, to pay perhaps vastly more than her real value, or be forced to the trouble and expense of litigating any issue of that character. The appellant treats the jurisdiction to be exercised under the statute as though governed exclusively by the principles applicable to courts of equity. But with these neither the statute nor the proceedings under it, so far as concerns the admiralty courts, have any relation, except merely incidentally, whenever it happens that the claims are in excess of the value of the vessel or her salvage. In that event the rules of equity procedure come in, not for the purpose of determining the jurisdiction of the court, but only as they relate to proceedings in bankruptcy, or any other proceedings, when marshaling of assets becomes incidentally necessary.

Therefore, we hold that the owners of this vessel are entitled to a decree limiting their liability, so that the district court had jurisdiction to adjudicate the merits of the appellant's claim."

The authority of that case was followed by Judge McPherson, of the District Court of the Eastern District of Pennsylvania, in

The S. A. McCaulley, 99 Fed. 302,

but not without much reluctance as applied to the special circumstances of the case, as the court felt the injustice of the special proceeding under the facts before him. Suit had been brought by one Laughlin

in the state court against the owner of the tugboat "McCaulley". The action was there defended, but a verdict returned. Appeal was taken to the Supreme Court of the State of Pennsylvania, which reversed the trial court for the latter's refusal to entertain the partial defense of limited liability. Following the decree of the Supreme Court, the special proceeding for limitation of liability, provided by the Revised Statutes and the Rules of the Supreme Court, was instituted. Judge McPherson plainly spoke his mind against the action of the petitioners in having defended the case on its merits in the state court, and then, two years later, after defeat, resorting to the admiralty court where they might have gone in the first instance, or, as he stated it:

"By following the course described, the petitioners have been enabled to take their chances of success before a tribunal where they might hope to defeat the claim entirely by proving the contributory negligence of the decedent; and now, having discovered that this effort is likely to be unsuccessful, they have determined to try their fortunes in a different jurisdiction, and by a different method of trial. The merits have been once determined against them by a jury; and, although the judgment has been reversed, it was reversed merely for the reason that the right to limit the defendant's liability had not been applied by the court below. The result is to give the petitioners an undue advantage. *But, as I look at the statutes and the decisions upon this subject, it is impossible to deny them the right to come into the federal tribunal, even after they have taken their chance of a favorable verdict in the common pleas.*" (Italics ours.)

The result was that, though terms were imposed, the court acknowledged the right of the petitioner to invoke the special proceeding in admiralty, notwithstanding but one claim existed. In so doing Judge McPherson expressly followed

Quinlan v. Pew, supra,

of which he said:

“I cannot avoid the conclusion that the circuit court of appeals for the first circuit was right in deciding (*Quinlan v. Pew*, 5 C. C. A. 438, 56 Fed. 111) that a state court does not possess the machinery fully to administer the act of congress, even in cases where there is only one claimant. It may be (although I do not decide the point) that a state court is a ‘court of competent jurisdiction,’ within the meaning of section 4285 of the Revised Statutes, and may therefore have power to appoint a trustee under that section. But, even if this be true, a state court has no power to appraise the vessel under rule 54 in admiralty, or to carry out the other provisions there to be found, and these provisions are now as much a part of the right as is the statutory direction concerning the appointment of a trustee. If the state court has no power to appoint a trustee, this furnishes a second reason for upholding the owner’s right to apply to a court of admiralty.”

It is apparent that, while following *Quinlan v. Pew*, the court reached a like conclusion by independent reasoning, which compelled him to hold that the common law could not furnish the remedy for limitation of liability prescribed by the terms of the statutes creating the right, and the rules of procedure formulated by the Supreme Court to carry the statute into effect.

It is to be noted that in this respect the court was not in accord with Judge Brown, although the latter's opinion was not mentioned, notwithstanding it must have been before the court, as *The Rosa*, supra, was of seven years' earlier date.

In

The M. Moran, 107 Fed. 526,

where but one claim for loss of a dredge was presented, although the petition alleged the possibility of other claims, Judge Thomas, of the District Court for the Eastern District of New York, distinguished *The Rosa* by the fact that in the latter there were no averments of the possibility of other claims, and the nature of the liability against which limitation was sought, showed that there could be no others. Judge Thomas, however, frankly said that, if the facts in the case before him were similar to those in *The Rosa*, the later would not be easily disregarded, notwithstanding a contrary holding by the Circuit Court of Appeals in *Quinlan v. Pew*.

But in 1903, when the question again came before Judge Thomas in

In re Starin, 124 Fed. 101,

he held, without discussion, that the court had the right to entertain the special proceedings for limitation, although the history of the litigation showed that a single claim for injuries received by the breaking of a cleat had been prosecuted to judgment in the lower court, and appealed through all of the appellate courts of New York. The contention made was that

the failure to interpose the defense in the state court had constituted a waiver of the defense. This, Judge Thomas expressly disaffirmed, and sustained the right of the petitioner to proceed for limitation in the District Court.

The doctrine of *The Rosa* was disaffirmed in

The Hoffmans, 171 Fed. 455,

decided by District Judge Adams, the successor of Judge Brown, in the Southern District of New York. He treated the question with great fullness, exhaustively reviewing and comparing the various decisions to that time. He pointed out that notwithstanding the rulings of Judge Brown in *The Rosa* and *The Eureka No. 32*, the case of *Quinlan v. Pew* had come to be generally followed, even in the Southern District of New York. His personal opinion, apparently aside from the precedent of the prevailing practice, was that the reasoning of the Circuit Court of Appeals in *Quinlan v. Pew*, and the result there reached, was more consonant with sound maritime principles than the contrary views expressed. While recognizing that proceedings in a state court often suffice to give an opportunity to present the defense of limitation of liability, by way of answer, Judge Adams pointed out that such proceeding was manifestly useless when anything in the nature of affirmative relief was necessary. If the owner desired to proceed affirmatively, the proceeding in the District Court provided by the Revised Statutes and the Supreme Court rules alone offered relief. He was also of the opinion that if there was more than one forum in which the shipowner could

obtain relief under the statute, the right of selection would seem to rest with him. From the fact that it had been well settled that a shipowner could resort to the special proceedings in a District Court at any time before satisfaction of judgment, even if the question of liability has been fully litigated in the state courts, as recognized in

The Benefactor, 103 U. S. 239; 26 L. ed. 351,

Judge Adams concluded:

“If vessel owners can finally resort to the District Court to obtain the benefits of the act, it is difficult to see why they are not entitled to at the outset and it seems unjust to require them to determine in the beginning whether or not there is more than one claim. The machinery of the court affords the only adequate method of legally determining that fact and though it may turn out that there was but one outstanding claim and there may be some incidental hardship to a claimant, that seems to me no sufficient reason for depriving a vessel owner of his statutory right.”

From the foregoing review of the cases, it appears that the weight of authority and later day practice unquestionably upholds the right of the admiralty courts to entertain a proceeding for limitation of liability where there is but one claim, on which suit may have been already brought in a common law court. One Circuit Court of Appeals' decision, and the only one discussing the question, supports it, while the Circuit Court of Appeals for the Second Circuit impliedly upheld the doctrine, when it ordered a right of limitation in

The Tommy, 151 Fed. 520,

where there was but one claim possible. The Eastern District of Pennsylvania has followed the rule since it first came before it, as has the Eastern District of New York, and while Judge Brown, of the Southern District of New York, held a contrary view so long as he presided over that court, for he reaffirmed *The Rosa* in *The Eureka No. 32*, yet his successor, Judge Adams, not only disagreed with him as to the correctness of the former's conclusion in *The Rosa*, but the practice in that district ever since appears to have been in recognition of the right to the special proceeding.

Such is also the practice of the District Court for the Northern District of California, for Judge De Haven, in

The Ocean Spray, 117 Fed. 971,

upheld the jurisdiction by entering a decree of non-liability on the merits, where the liability against which the limitation proceedings were instituted was of such a character as to give rise to but one claim, on which suit had already been brought in the state courts, but which at the time of the commencement of the limitation proceeding, was pending for a new trial after reversal by the Supreme Court of a verdict and judgment for \$2,000 rendered on the first trial.

Appellant's petition (apostles p. 8) does not aver that no other claim than that of the Hammond Lumber Company did not exist, nor was the nature of the casualty upon which that claim is founded such as to preclude other claims, as in the case of a single

personal injury, which gave rise to *The Rosa* and *The Eureka No. 32*. Rather was it of the class which Judge Brown recognized in *The Eureka No. 32* to be an exception to his ruling, when he said:

“Where suit has been brought upon one claim and the circumstances are such as to make probable the existence of other claims arising out of the same accident, as in cases of collision, or from any other circumstances of the same voyage, sections 4284 and 4285 may no doubt be rightly invoked and proceedings thereunder instituted for a pro rata distribution.”

So far as the petition discloses, numerous claims might have arisen on the voyage, or resulted from the breaking up of the raft, if it were the result of negligence, and yet, unless the nature of the accident makes impossible the existence of other claims, or the petition expressly shows no other claim, even the rule of *The Eureka No. 32* will not apply.

Again, the cases against the right to invoke the special proceeding, where but one claim exists, are all predicated upon the saving clause of the Judiciary Act of 1789. If, for any reason, the state court, in which the prior action may have been instituted is not able to give the owner, by way of a common law remedy, all the relief provided by the federal statutes and the rules of the Supreme Court, then those decisions do not sanction the withholding of the proceeding.

If, for instance, the right to limitation is questioned, that controversy is one solely of admiralty cognizance and cannot be adjudicated in a common law action.

This is clearly pointed out in *The Lotta*, supra, wherein the court said:

“The act of 1851 and the rules of the Supreme Court passed to carry it into effect confer on the District Court jurisdiction to determine whether the case is one of limited liability. *This is a question of admiralty and maritime jurisdiction which must be determined by the courts of the United States*, and the decision upon the question of the injunction is predicated upon the assumption that that question is not involved in the suit in the state court, and that the only questions to be decided there are, first, whether the defendant is liable at all, and, if so, as to the value of the vessel and her freight, which is the limit of defendant’s liability.”

Appellee, in its answer to the petition, not only expressly denied the right of appellant to a limitation of its liability, but prayed that the court “deny the said limitation.” (Apostles pp. 87, 89.) An issue was thus presented which can only be determined by the courts of the United States in the special proceeding.

It was admitted by Judge Brown in *The Eureka No. 32*, supra, that a common law remedy, through which the state courts have alone power to act in cases of admiralty and maritime jurisdiction, does not include the equitable powers for the appointment of a trustee. And yet the statute granting the limitation expressly provides for the transfer of the interest of an owner in a vessel to a trustee. (Sec. 4285, Rev. St.) If the statute is to be given full force and effect, how then could appellant’s right to proceed in the District Court have been denied, if, instead of giving a stipulation

for value, it had actually transferred its interest to a trustee appointed by the court? It had the right so to do, or the statute is ineffective. Instead, it had due appraisal made and gave the required stipulations for value as permitted by the Supreme Court rules (Rule 54). Inasmuch as the rules do not derogate from the statutes, but supplement them by providing the machinery of the law by which they are to be carried into effect, appellant stands in the same position as though it had surrendered its interests to a trustee.

Providence & New York S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 600; 27 L. ed. 1038, 1046.

So long, therefore, as appellant proceeded affirmatively, it is undeniable that the common law was inadequate to give it the statutory relief to which it was entitled. The right is not, and cannot be, conditioned upon the number of claims which may be presented in the proceeding, but arises not only from the express grant of the federal statutes, but from the incompetency of the common law to afford the relief.

The S. A. McCaulley, *supra*.

The foregoing authorities, to which others might be added if necessity required, show it to be a settled rule of law that the district court has the right to entertain the special proceeding when only one claim has been presented.

Appellant is afforded no protection by the action of the lower court in dismissing the petition as to appellee and retaining it for all other proceedings, for it is clear that if the proceedings were properly instituted, and

the procedure prescribed by the rules properly followed, any subsequent event, such as the presentation of only one claim, would not deprive appellant of the undeniable right to limit its liability as accorded by the statutes and the Supreme Court rules. If any other result were possible, it would then be necessary for a shipowner to wait, in uncertainty, until such time had elapsed as would make positive the fact that more than one claim would be presented—a condition not only inconsistent with a fair interpretation of the statutes, but one concerning which Judge Adams, in *The Hoffmans*, supra, said:

“it seems unjust to require them to determine in the beginning whether or not there is more than one claim”.

By weight of authority and reason, then, the lower court's decree, dismissing the petition of appellant, because only one claim had been presented, was erroneous.

II.

THE DISTRICT COURT ERRED IN HOLDING, WITHOUT A TRIAL UPON THE MERITS, THAT BOTH TUGS WERE EQUALLY LIABLE, IF LIABILITY EXISTED AT ALL, AND MUST BE SURRENDERED, AND IN DISMISSING THE PROCEEDING AS TO APPELLEE BECAUSE THE COMBINED VALUES OF BOTH TUGS EXCEEDED THE ONE CLAIM PRESENTED PURSUANT TO THE MONITION. (Specifications II, III and IV.)

The question thus presented is whether or not the fact that both tugs were engaged in the towage service requires the surrender of both tugs to a trustee, or in

lieu thereof, the giving of a stipulation for their values, as a condition to the right of limitation of liability. Inasmuch as the statute limits the liability of the owner of any vessel to the amount or value of the interest of such owner in the vessel, and her freight then pending, for any act, matter or thing, lost (loss), damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner (Rev. St. Sec. 4283), the question is one as to what is meant by the vessel, within the purview of the statute. The lower court held that:

“Both tugs being engaged in the same venture at the time of the disaster, are equally liable, if there is liability at all, though the tug ‘Dauntless’ was the only one attached directly to the raft.” (Ap. p. 119.)

It thus, without a hearing, determined that both tugs were equally liable *because engaged in the same venture*. The indirect effect of the ruling was to hold that the *matter of liability* for the loss was the criterion by which the necessity of surrender is to be determined.

The latter test, thus applied, was not out of accord with the settled rule. But instead of proceeding to a hearing by which the question of liability could have been determined, the court concluded, as a matter of law, that both tugs were liable because engaged in the same venture. It thus made the direct test which it applied, *that of engaging in the same venture, rather than that of liability*. This, we contend, is not supported either by reason or by weight of authority, for in every case, so far as we are aware, the courts

have addressed themselves to the determination, from evidence adduced, of the identity of the offending vessel. If the court had proceeded to a hearing and then found that both tugs had negligently brought about the loss of the raft so that they could have been held responsible therefor *in rem*, then, by reason of common ownership, appellant would have been required to respond for their combined values; but if only the "Dauntless" was in fault, if liability existed at all, surrender of that vessel alone would have been required, or a stipulation for her value given in lieu thereof. The fact that both tugs were engaged in the same venture, without regard to the question as to the fault of which, if any, caused the loss, is not the test of liability.

The first reported decision on this general subject is that in

The Arturo, 6 Fed. 308,

a case in which two tugs belonging to different owners were employed in towing a barkentine, one on each quarter. While so engaged, the barkentine became stranded, thereby causing the loss complained of. Both tugs were held responsible because their joint action caused the stranding. Though both were engaged in the same venture, the court recognized the possibility of a separate liability for the negligence of one. This clearly appears from the following excerpts from the opinion:

"If, therefore, one tug was wholly in fault, as by a defect of her machinery, or the like, she alone would be responsible. * * * I have taken for granted that there might be a still further relaxation as to any fault distinctly committed by one of them only * * *."

In the case of

The Bordentown, 40 Fed. 682,

a petition for limitation of liability was filed by the Pennsylvania Railroad Company, owner of the three tugs, "Bordentown", "Winnie" and "Willie". The tow left the port of South Amboy in charge of the "Willie" and "Winnie". Shortly afterward the tug "Bordentown" took charge of the fleet of canal boats in tow, and later the "Willie" was detached. The tug "Winnie" acted as a helper and was under the *charge and command of the master of the fleet*, who was on board of the "Bordentown". On the voyage a heavy sea was encountered, with the result that all but one of the canal boats were lost.

The court held the petitioner liable for the loss and extended its liability to the value of the tugs "Bordentown" and "Winnie", because of the fact that the real fault was committed in taking the tow out into the bay under circumstances which the tow was wholly unfit to encounter. This was the act of the master of the "Bordentown", and at the time his fault arose, the "Winnie" was as much a part of the moving power as the "Bordentown", *and was equally under the same direction of the master*. The fault was common to both vessels. This was clearly pointed out by the court when it said:

"I think the petitioners are, therefore, liable for the imprudent and negligent navigation of their employees in taking the tow out into the bay under circumstances which the tow was wholly unfit to encounter. * * * The real fault was in bringing

the tow into that situation. * * * At the time when the *master's* fault arose, the 'Winnie' was as much a part of the moving power as the 'Bordentown', and was equally under the same direction."

That the fact of joint service is not alone the test, but that the fault must be one which can be attributed to one standing in actual relationship to the operation of both vessels, and not to one alone, was expressly recognized by Judge Brown when he said:

"Where all the tugs employed belong to the same owner, *and are under one common direction*, and are engaged in the service at the time when the fault is committed, they are in the same situation, as it seems to me, as a single vessel, *as respects responsibility for the negligence of the common head.*" (Italics ours.)

The question of limitation of liability was thus predicated upon the actual fault producing the loss, and that fault was not determined by the fact that both vessels were engaged in the same venture.

Such, we understand, to be the ruling of this court in *The Columbia*, 73 Fed. 226.

There the question was not one of liability of two or more tugs to their tow, but of a tug and barge to a member and representatives of members of the crew of the tug, and to the owner of the barge's cargo. The injuries, deaths, and damage to cargo resulted from the sudden listing of the barge while an attempt was being made to temporarily repair a leak which resulted from the tug negligently bringing the barge into collision with a wharf at Astoria. After separate actions had been commenced by the claimants, limitation of lia-

bility proceedings were instituted by the owner and lessee of the barge, and the question arose as to whether the barge alone, or both tug and barge had to be surrendered. The court below held that the barge alone was required to be surrendered, on the theory that the proximate cause of the loss and damage was the collapsing of the barge, due to the negligent shifting of sacks of wheat by the master of the barge. On appeal, this court reversed the district court, and held that both tug and barge must be surrendered to obtain a limitation of liability.

The court said:

“In the present case, the barge and tug had the same owner, and both were operated by the same carrier. In the voyage, both were necessarily under the control of the master of the tug. They constituted the instrument of carriage, to which the wheat was liable for the service, and on which the owners of the cargo had a lien for the due performance of the contract of carriage. The case shows that the tug, having the barge loaded with wheat in tow, left Portland about one o'clock in the afternoon of October 21, 1892, and reached Astoria about 12 o'clock that night. Notwithstanding there is nothing in the case to show that the contract of carriage contemplated the landing of the wheat at Astoria, or the tying up of the barge at the dock at that place, but, on the contrary, the delivery of the wheat from the barge to the ship Westgate, yet the tug—due, probably, to the late hour of arrival—undertook to tie up at the dock, and, in doing so, carelessly ran the barge against the piles of the dock, and with such force as to knock a hole in her stem, thereby causing a serious leak. The master of the tug continued, after the accident, to exercise control over the barge, as well as the tug, changed its position, put the engineer of the tug at work

with a siphon to pump the water out of the barge, and himself went, with one of the deck hands of the tug, into the hold of the barge for the purpose of building a bulkhead to guard against the water, and was so engaged when, about two hours after the accident, the barge collapsed, causing the death of the master and deck hand of the tug, the injury to Boyce, a deck hand of the barge, and the loss of the wheat of Balfour, Guthrie & Co.

“The court below held that the collapsing of the barge was occasioned by the negligent shifting of some sacks of wheat by the master of the barge, and that that act of his was the proximate cause of the loss and damage in question. But no question of proximate cause, we think, arises in the case, for the reason that the tug and barge are, in law, considered one vessel, for the purpose of the voyage in question, and, whether the accident giving rise to the loss and damage be directly attributable to the acts of the master of the barge, or to those of the master of the tug, it is equally the negligence of the carrier, for which it contracted to be liable.”

It is clear from the reasoning of the court and the authorities which it cited that it was determining the question of liability of tug and barge *to third parties* as an instrument in performing a contract of carriage for the voyage, and that it was not laying down a rule which would hold two or more tugs liable for the loss of a tow, simply because they were engaged in a common service, irrespective of what might be the proximate cause of the loss. Unquestionably, the Supreme Court in *The Northern Belle* and *The Keokuk*, cited, held steamers and barges to be as a single vessel when lashed together and under common command, and dependent upon the steamer's motive power. In *Sturgis v. Boyer*, cited, the court pointed out the circumstances

under which tug and tow might be jointly, or each severally liable, depending upon the question of control over the vessels. But in all of those cases, the question was one of responsibility to third parties, and not one of liability between two or more tugs and a common tow.

In holding that the question of proximate cause of the loss did not arise in the case,

“for the reason that the tug and tow are, in law, considered as one vessel for the purpose of the voyage in question, and, whether the accident giving rise to the loss and damage be directly attributable to the acts of the master of the barge, or to those of the master of the tug, it is equally the negligence of the carrier, for which it is liable,”

the court was unquestionably enunciating a proposition of law having application solely to the contractual obligation of a carrier to the shipper of cargo, and was not intending to hold that the fact that two tugs, of common ownership, were engaged in joint towage, rendered them equally liable, irrespective of whether the negligence of one or both was the proximate cause of an injury to the tow. Certainly the two cases bear no resemblance to each other.

If the fact of joint service always meant joint liability, then the Supreme Court's decision in

The Connecticut, 103 U. S. 710; 26 L. ed. 467, was wrong, for then both the “Stevens” and the “Connecticut” should have been held liable *in rem* to their tow, for liability *in rem* is independent of the question of common ownership. The court did not so rule, however, but determined the question of liability as one

of proximate fault. It may be, as suggested in *The Bordentown*, supra, that if there had been common ownership, under a single directing master, whose fault caused the loss, the case would have fallen within the rule of *The Bordentown*. But the very suggestion of Judge Brown points to the necessity of a fault common to both vessels, not joint service, as the proximate cause of a loss.

It necessarily follows that *The Columbia* is not an authority in support of the decree.

That the ruling in *The Columbia*, supra, is to be confined to the question of the contractual obligation of a carrier to its cargo owner, is illustrated by the fact that in

Van Eyken v. Erie R. Co., 117 Fed. 712, the court, in determining whether a tug and barge, or tug alone, should be surrendered in a limitation proceeding to answer for damages done by the barge through the negligence of the tug, ordered the surrender of the tug because it was the one which committed the wrongful act, although the tug and barge there were as much a "united instrument" as the "Oklahoma" and her barge in *The Columbia*. It was not the fact that both were of common ownership and engaged in the same venture, which formed the test, but the court determined the necessity of surrender by ascertaining the vessel committing the wrongful act which constituted the proximate cause of the loss, irrespective of the fact of joint service. This appears from the following excerpt from the opinion:

"The remaining question relates to the necessity of surrendering barge No. 9 in addition to the tug.

The libelant suggests this upon the theory that the barges and tug 'formed a common united instrument of commerce, moving as an entirety, when the tort was committed, although afterwards separated in the successive collisions.' *The Bordentown* (D. C., 1889), 40 Fed. 682; *The Columbia* (1896), 19 C. C. A. 436, 73 Fed. 226. Generally, in collisions the tug has been regarded as the responsible actor. In the present case the proximate cause of the injury was the disordered steering gear, and *in rem* the tug alone would be liable. The fact that the defective condition of the tug enabled her tow to collide with the pier, and become detached, and injure another vessel, did not make the presence or movement of the tow a primary agent in effecting the injury. The presence of the barges was a part of the condition under which the wrongful act or omission took effect. It was not a part of the wrongful act. Therefore it is concluded that the respondent may limit its liability upon surrendering the tug."

The tug alone was required to be surrendered because it was solely liable *in rem* for the fault.

Later, in

The Anthracite, 162 Fed. 384,

Judge Adams of the District Court of the Southern District of New York, held two tugs, jointly engaged in a towing service, liable because of the fact that the master of the "Anthracite" had charge of the navigation of his tug and of the "Cleary". The question of liability was again determined by that of the proximate cause of the damage, and the case in the court's opinion, was within the ruling in *The Arturo*, *supra*, because their joint action through the directing mind of the master of the "Anthracite" conduced to the loss.

The decision was affirmed in 168 Fed. 693, the court pointing out that both tugs should be condemned *because both were in fault*. Circuit Judge Lacombe said:

“The fault was in steering, rounding to so carelessly as to bring the tow against the rock. The master of the Anthracite directed the steering, and the master of the Cleary submitted herself entirely to his commands. There was no independent action. In the steering both participated.”

The principle of this case was followed in

The Defender, 208 Fed. 836,

where the tug alone was held responsible, and the launch, though assisting in the tow, was exonerated because she was without actual fault.

The Circuit Court of Appeals for the Second Circuit again had the question before it in

The Sunbeam, 196 Fed. 468,

where the *element of fault again was the keynote* of a discussion as to the necessity of a surrender of one or more vessels. To compel a surrender of a number of vessels in a proceeding of this kind, the court said:

“They must be shown to be guilty of a fault that caused or contributed to the accident.”

The petitioner’s liability was, therefore, limited to the value of the scow “*Sunbeam*”, the vessel in fault.

The question was examined with great care by the Circuit Court of Appeals for the Second Circuit in

The W. G. Mason, 142 Fed. 913,

and the decision of the District Court, holding that two tugs of common ownership, engaged in a joint towage,

must be surrendered, was reversed. The Court of Appeals held that but one tug was required to be surrendered because of the fact that *that tug was alone in fault*. The damage to the steamer "Gratwick" resulted from the negligence of the tug "Mason" at her bow, while the steamer was being turned around the end of a breakwater in Buffalo harbor, and was not contributed to by the tug "Babcock", assisting at the steamer's stern. In the course of its opinion, the court, speaking through Circuit Judge Wallace, exhaustively reviewed all of the decisions to that date, bearing upon the question, and expressly pointed out that the surrender of two vessels, engaged in joint service, had been required only because of the fact that both were in fault. Where such liability did not exist because of the absence of actual fault on the part of both, as in *Van Eyken v. Erie R. Co.*, supra, liability was limited to the value of the one in fault.

It was pointed out that the fault of both vessels belonging to the same owner did not affect the question of liability *in rem*, because such liability was independent of the personal liability of the owner and that the question of the obligation of an owner to surrender a vessel was predicated upon the liability *in rem* of the vessels for their fault.

The test thus applied was that of determining the actual fault, and was not conditioned upon the sole facts of common ownership and joint service. The decision is so to the point that we quote the court's conclusions:

"A tug and her tow are deemed a single vessel under steam, within the meaning of the rules of

navigation for preventing collisions; but it has never been asserted elsewhere that they could be regarded as one vessel for the purpose of ascertaining their relations as between themselves, or their several liabilities to respond for the consequences of a fault of one of them. Even when two vessels are lashed together, the question of the liability of each always depends upon ascertaining whether that vessel was in fault. *The James Gray v. The John Frazer*, 21 How. 184, 16 L. ed. 106; *Sturgis v. Boyer*, 24 How. 110, 16 L. ed. 591; *The Carrie L. Tyler*, 106 Fed. 422, 45 C. C. A. 374, 54 L. R. A. 236.

“The cause of action here is not one for the breach of a maritime contract of towage; but it is for the breach of a duty imposed by the law, independently of contract or consideration, and is therefore founded in tort. *The Quickstep*, 9 Wall. 665, 19 L. ed. 767; *The Syracuse*, 12 Wall. 167, 20 L. ed. 382. In *The John C. Stephens*, 170 U. S. 125, 18 Sup. Ct. 549, 42 L. ed. 969, the Supreme Court said:

“ ‘This court, more than once, has directly affirmed that a suit by the owner of a tow against her tug to recover for an injury to the tow for negligence on the part of the tug is a suit *ex delicto* and not *ex contractu*.’

“If the liability of the owner for the tort or wrong of a vessel, arising from the misconduct, or negligence of her master, or crew, could be enforced against another vessel belonging to the same owner, whenever she might happen to be engaged in the same enterprise with the other vessel though acting in an independent capacity, and under the control of her own master and crew, in performing her part of it, the spirit and meaning of the statute limiting the liabilities of vessel owners would be disregarded. The statute incorporates into the law of this country the rule of liability which was administered as a part of the general maritime law by the courts of continental Europe, and was adopted in England by the acts of 26 and

53 George III, and by which the liability of the owner for all torts of the master and seamen in charge of the navigation of his ship was limited to the value of his ship and freight. For the promotion of commerce, and to protect those who invest their money in ships from hazard of losing the rest of their property through the fault of those to whom they are obliged to entrust the navigation, the statute limits their liability for the faults of navigation of a particular ship to the amount invested in that ship, provided they have not had any personal participation in these faults. 'It limits the shipowner's liability in three classes of damage or wrong happening without their privity, and by the fault or neglect of the master or other person on board.' *Norwich Co. v. Wright*, 13 Wall. 104, 121, 20 L. ed. 585. To subject both vessels in a case like the present to liability in rem would make the owner responsible for a fault committed without his privity or knowledge beyond the value of the ship in fault."

The decision was thus contrary to the ruling of the lower court in the instant case, that both vessels were equally liable because engaged in the same venture. They are liable, under the authority of the case, *only if in fault*, irrespective of ownership or joint service, and are not liable because engaged in the same venture. And, as was impliedly admitted by Judge Dooling, surrender of both, or stipulations for value, could only be required if liability existed. The error of the lower court was in its assumption of a false premise as to the extent of liability.

Nor was there anything in the ruling in the subsequent case of

Thompson Towing & Wrecking Ass'n v. McGregor, et al., 207 Fed. 209,

inconsistent with the principle enunciated in *The W. G. Mason*, supra.

In that case it appeared that the lighter "Stewart", and several other vessels belonging to petitioner, were engaged in releasing the steamer "Elwood" from a stranding in Mud Lake, an arm of Lake Huron, and that during the course of operations, the boiler of the "Stewart" exploded, causing the injury and death of two workmen on board the lighter. The evidence adduced conclusively showed that the proximate cause of accident was the defective condition of the boiler, and that the local manager of petitioner dispatched the vessels, at least charged with knowledge of the condition of the boiler.

The question arose as to what vessels should be surrendered in the limitation proceeding, the claimants insisting upon all of the vessels engaged in the work, and petitioner that of the lighter alone. The court held, however, that the lighter "Stewart" and tug "Merrick" should have been included in the original surrender.

From the District Court's opinion, a portion of which was adopted by the Court of Appeals in its decision, it is certain that the master of the "Merrick" directed and controlled the every movement and work of the lighter, a vessel without any motive power whatever, and dependent upon the assistance of the "Merrick". At the time of the accident they were found to have been actually attached to each other through the "Elwood". *The proximate cause of the loss was, therefore, the negligent act of the manager in common control over the two vessels, actually attached to each other,*

and engaged in the same service, and both vessels were required to be surrendered because of the fault thus attributable to both.

The District Court distinctly pointed out that, but for the fault common to both, the surrender of the one in fault would only have been required. It was stated by Judge Dennison:

“The situation would be different if the negligent act which is to condemn the particular, guilty rem had been the independent act of an agent who had to do with the Stewart only (as in *The Mason* and similar cases). Here, however, the damage(d) claimant(s) count upon the negligence of the agent in charge of both boats who equipped and sent out the defective boiler as a part of the working unit, and the damage happened at a moment when these possibly separable parts were in fact united.”

The question of fault is thus held to be the foundation of liability, and, therefore, of surrender. It could not have been more pointedly stated than by Circuit Judge Warrington, when he said of the refusal of the lower court to hold any of the vessels but the “*Merrick*” and the “*Stewart*”:

“The eliminating processes of the trial court do more than to illustrate the error of the criticism made of the decision. *They point out the necessity of studying the facts not only of the case in hand, but also of the cases cited and relied on as precedents, for the purpose of identifying in each instance the offending thing, whether that be a single or a composite instrumentality.* (Italics ours.)

In all of the cases, it thus clearly appears that the courts have laid responsibility and the necessity of sur-

render upon the element of fault, and, in each case, before designating the vessels to be surrendered, have pointed out the specific fault from which liability resulted. In none of them has the bold rule been promulgated, holding that two vessels, attached together, must be surrendered irrespective of the question as to whether they were both, or only one, in actual fault; nor have any of the courts intimated that the fault to one was to be attributed to another vessel attached to the former, simply from the fact of such attachment, common ownership and joint service. *The constant test has been that of fault, and not that fault follows to one from the fact that she may be commonly owned and engaged in the same venture with another, attached to her, actually committing the fault.* Unless, therefore, this court shall adopt a rule by which two tugs, attached to each other, and engaged in common service, are, for those reasons, liable for faults of each other, the decree of the lower court in so holding was erroneous.

But such a rule would contravene the principles by which the Supreme Court exonerated the "Stevens" from liability in *The Connecticut* and *The S. A. Stevens*, supra. Until liability for the wrong is determined, the matter of common ownership is of no importance upon the question of surrender. The Limited Liability Act does not require surrender because of common ownership, but, because of an existing fault, does require the owner to surrender his interest in the vessel, or vessels, actually in fault.

With the question of the necessity of petitioner surrendering the tugs "Dauntless" and the "Hercules" dependent upon that of the fault of both tugs, the lower court could not, without a hearing, determine that both were responsible for the loss, for the reason that the liability of both tugs, and particularly that of the "Hercules", was put in issue by the petition and answer.

III.

THE DISTRICT COURT ERRED IN NOT PROCEEDING TO A TRIAL UPON THE MERITS. (Specifications II, III and IV.)

If the question of the necessity of surrendering both vessels is conditioned upon the fact of fault being attributable to both, as all of the reported cases bearing upon the subject hold, then the lower court should have proceeded to a hearing upon the question of fault. Instead, it determined, as a matter of law, that the "Hercules" was in fault because engaged in the same venture with the "Dauntless". If the court's ruling could, by any chance, be correct, then it means that appellant is to be forever foreclosed from producing proof in denial of the alleged fault of the "Hercules", as it must follow, as a necessary conclusion from the premise upon which the lower court proceeded, that appellant would have no more right to adduce proof and litigate the question in the state court than it had in the District Court. If the District Court could say, as a matter of law, because of common ownership and joint service, that the "Hercules" is equally in

fault with the "Dauntless", if fault on the part of the latter existed, then the state court has equal power to so hold. The result would be that whatever the fault of the "Dauntless" which may have caused the loss, the non-participation of the "Hercules" in such fault would not be open to question. Suppose, for instance, that the loss of the raft was due to some act of a member of the crew of the "Dauntless", entirely disconnected from the "Hercules", it certainly would not be urged that, under those circumstances, the "Hercules" would be liable, for the fault would not be common to the two tugs. To hold her so would be inconsistent with the ruling of the Supreme Court in *The Connecticut* and *The S. A. Stevens*, *supra*. The fact that the tugs were towing tandem would not involve the "Hercules" in liability for the supposed fault, any more than the fact of the "Stevens" and the "Connecticut" being made fast to the tows, rendered the former liable for the negligence of the latter. Liability is not conditioned upon the method of the vessels being attached to each other, even in cases where there is fault attributable to both, as illustrated by the different ways in which the "Bordentown" and "Winnie", and "Stewart" and "Merrick" were attached to each other.

The Bordentown, *supra*.

Thompson Towing & W. Co. v. McGregor, *supra*.

And if the "Hercules", under the supposed case, could not be held in fault for the negligence of a member of the crew of the "Dauntless", then appellant

would not be compelled to surrender her, or respond for her value.

The W. G. Mason, supra.

That there may be separable negligence in the case of a joint towage service is shown by the remarks of Circuit Judge Lowell in *The Arturo*, supra, wherein he said:

“If, therefore, one tug was wholly in fault, as by a defect of her machinery, or the like, she alone would be responsible. But for their joint action, so far as it conduced to the loss, I hold them to be jointly responsible.”

The W. G. Mason, supra.

The Defender, supra.

The possibility of separate negligence is, perhaps, best illustrated by the case of

The Hercules, 81 Fed. 218,

wherein Judge Morrow held that one of the questions to be determined from the issues made up was:

“Whether the stranding of the ship ‘Packard’ arose or was caused by any negligence on the part of both tugs, or either of them, in towing the ship.”

The case was one in which not only was the right of limitation denied, but in which the question of the fault of the tug “Sea Queen” was involved with that of the tug “Hercules”, in an alleged joint towage service. The fact that the court considered the question of the alleged faults of the two tugs for the purpose of determining whether petitioner was required to answer for the value of one, or both, demonstrates that

faults may be separable in a common service as between two tugs of same ownership.

Inasmuch as the fault must be mutual to the "Dauntless" and "Hercules" to require appellant to respond for the value of both, the state court, if it were to administer the statutory limitation of liability, would have to make inquiry into the subject of the alleged respective faults. Otherwise, if a fault were shown on the part of the "Dauntless", which, in fact, was not common to the "Hercules", appellant would be deprived of its rights under the Limited Liability Act. And if the state court would be required to adduce proof upon the question, the District Court should have done so, for it could not properly determine, as a matter of law, that a common fault existed simply because of the fact that the tugs were engaged in the same service.

If proof were taken by the District Court and the evidence showed that the "Hercules" was without fault contributing to the loss of the raft, then, inasmuch as the appraised value of the "Dauntless" was less than the value of the raft, the value of the vessel required to be surrendered, assuming that the "Dauntless" was found in fault, would be less than the one claim presented, and hence a case that came within every requirement of the law for invoking the right of limitation of liability in the District Court.

It thus is manifest beyond all doubt that the District Court should have proceeded to a hearing for determining the question of fault on the part of the respective tugs. The issues framed by the petition, and claim and answer, and objections and answer to the claim, ex-

pressly included the question of the fault of the tugs, severally and jointly. Had, therefore, the cause gone to trial upon the pleadings, the question of appellant's right to a limitation of liability as granted by the statutes and Supreme Court rules would have been fully determined.

How is appellant to obtain its statutory rights of limitation of liability, if it is relegated to the state court on the theory that the limitation can as well be granted there as in the District Court, when appellee denies, as it has done in its answer to petition, appellant's right to any limitation, for it has been held that the question of the right of limitation is one of exclusive cognizance with the courts of the United States?

The Lotta, supra.

The denial of the right of limitation forecloses the common law court from going into the question, for that court would be concerned alone with the question of appellant's liability arising from the alleged fault of the tugs, irrespective of whether it was that of the "Dauntless" or the "Hercules". A verdict of the jury would not determine which of the tugs was at fault, or its nature, but would simply be, if liability on the part of the owner was found to exist, for a fixed sum of money damages. Such an award would be of no assistance to the District Court when it came again to examine the question as to which of the two tugs was in fault, and thus the question of fault would have to be tried anew, or appellant's statutory rights denied to it.

Under all of the circumstances, therefore, we respectfully submit that appellant was within its right in presenting its petition for limitation of liability to the District Court and that the court erred in dismissing the petition as to appellee.

We respectfully ask that the decree of the court below be reversed, with instructions to proceed to a trial on the issues made by the pleadings, in accordance with rules and practice in limitation of liability proceedings provided.

Dated, San Francisco,
May 16, 1914.

Respectfully submitted,

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellant.

No. 2388

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SHIPOWNERS AND MERCHANTS'
TUGBOAT COMPANY (a corporation),
owner of the Steam Tugs "Dauntless" and
"Hercules",

Appellant,

vs.

HAMMOND LUMBER COMPANY
(a corporation),

Appellee.

In the Matter of the Petition of the Shipowners and Merchants'
Tugboat Company (a corporation), owner of the Steam Tugs
"Dauntless" and "Hercules", for limitation of liability.

BRIEF ON BEHALF OF HAMMOND LUMBER COMPANY, CLAIMANT BELOW, APPELLEE.

This action was initiated by a petition for limitation of the liability of the Shipowners and Merchants' Tugboat Company, appellant, for the loss of a log raft valued at \$71,249.90, belonging to the Hammond Lumber Company, the appellee. The District Court heard

the testimony as to the value of the two tugs which, in tandem, were towing the raft and found that it was \$115,000.00. The petition for limitation does not allege that any person, other than the appellee, was damaged by the loss of the raft and subsequently a default against such other persons, if any, was decreed.

It further appears that prior to filing the petition the Lumber Company commenced a common law suit *in personam* against the Tug Company and that issue was joined and the case ready for trial. The basis of the Lumber Company's claim against the Tug Company was the negligent choice of the wrong channel out of the Columbia River for the tandem of tugs and the log raft, and the negligent concentration of the power of the two tugs on the towing machine of the latter, which was not strong enough to withstand the double strain.

The question then is: Did Congress intend to deprive appellee of its right to trial by jury in a common law court on an issue of negligence by a shipowner, whose combination of tugs forms a single instrumentality furnishing a united power along a single tow line to the raft, and necessarily steering on one and the same course, where the value of the combination is more than the damages claimed by the owners of the raft, the sole person injured?

Preliminarily let it be clearly understood that we are not urging that the court cannot limit liability because this is a case involving but a single claim. We do not contest the proposition of appellant's brief

laid down in the title of the first chapter and hence the discussion on pages 13 to 29 is beside the mark.

What we expect to establish is that:

1. Congress intended that there must be an excess of the one claim over the value of all which the owner has risked in the particular venture, to warrant taking the injured party from his common law court and depriving him of his right to trial by jury. If it appear that, although the petition be properly filed, the petitioner is not entitled to limitation on the facts of any claim, then the petition will be dismissed as to that claim and the case sent back to the State court;

2. This court has squarely decided that the owner, in order to obtain limitation, must surrender all he has at risk in the venture, during the course of which the injury is inflicted, regardless of the causal participancy in the wrong doing of any particular tug or vessel constituting a part of the venture;

3. Even if the doctrine of proximate causation *be* applied in determining the vessels to be surrendered, the Tug Company, if liable at all for the particular negligence charged, is liable for that negligence in the united operation of both tugs. *Res ipsa loquitur*, not necessarily of the negligence, but of the joint participancy of the tugs, and hence the necessity for surrender of both to obtain a limitation of liability for the negligence charged. The mere denial of such joint negligence places its existence in issue, but does not change its joint character.

I.

Congress intended that there must be an excess of the one claim over the value of all which the owner has risked in the particular venture, to warrant taking the injured party from his common law court and depriving him of his right to trial by jury. If it appear that, although the petition be properly filed, the petitioner is not entitled to limitation on the facts as to any claim, then the petition will be dismissed as to that claim and the case is sent back to the State court.

The Supreme Court has just passed on the long disputed question as to whether the limitation proceeding could be invoked where there is but one claim. In holding that Congress created such a right in the shipowner, the court clearly proceeds on the reasoning that it is the *limitation of his liability* which is the basis of the right. In that case the petition referred to an action pending in the State court for \$21,350.87, and alleged that the value of the steamboat did not exceed \$10,000. The court construes the provisions of the R. S. providing for limitation of liability and finds that, while they lend support to the theory that there must be a multiplicity of claims, they are controlled by section 4283, the section which provides for limitation. The court says:

“But to a right understanding of these sections it is essential that they be read with § 4283 (U. S. Comp. Stat. 1901, p. 2943). It contains the fundamental provision on which the others turn. It broadly declares that ‘the liability * * * for any * * * damage * * * occasioned with-

out the privity or knowledge of such owner * * * shall *in no case* exceed' the value of the vessel and freight. The succeeding sections are in the nature of an appendix and relate to the proceedings by which the first is to be made effective."

White v. Island Transportation Co. (April 13, 1914), 34 Sup. Ct. Rep. (Advance Sheets) 589, 591.

The next section, 4284, provides that where the

"whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them, they shall receive compensation from the owner in proportion to their respective losses".

Construing this with the preceding section, as suggested by the court, it must be apparent that if the fund or ship exceed the damage, there is no reason for the relief, certainly not if there is but one claim.

The case of *Richardson v. Harmon*, 222 U. S. 96, a single claim case relied upon by the Supreme Court in the White case, rests on a petition alleging:

"That the damages claimed in the pending action at law were \$35,000, and that they apprehended other actions of like kind, and if liable as claimed, the aggregate would greatly exceed the value of the interests of the owners in the vessel and her freight."

Richardson v. Harmon, 222 U. S. 96 at 101.

Indeed, to hold otherwise than that the jurisdiction depended on the claim being less than the fund, would permit the shipowner in every case to defeat the State jurisdiction by simply filing a petition for limitation.

That is to say, if a laborer or a passenger on the steamer Mongolia, who was injured by falling down an unprotected hatch while in the port of San Francisco, should sue for \$5,000 in a California court, a petition for limitation would deprive him of his pending suit and his right to a jury, although the bond in lieu of surrender of the vessel was for a million dollars.

So also, in a suit in the State court on a contract of maritime affreightment, a simple petition for limitation would oust the former's jurisdiction. In other words, the shipowner could force every case against him into admiralty, although when he, as plaintiff, had first chosen the State tribunal, the shipper, or passenger or officer whom he has sued must abide there with him. Certainly Congress did not intend that he should have this right for any other purpose than that of limitation.

The decision in *Quinlan v. Pew*, 56 Fed. 111, cited by the Supreme Court and our opponents, squarely rests its reasoning on the function of the court to limit liability. It says at the very page to which the Supreme Court cites it:

“ * * * if the owner of a vessel or wreck, under the circumstances of there being but a single claim outstanding, *large enough to absorb the entire vessel* or her salvage, could be compelled, on the verdict of a jury, to pay perhaps vastly more than her real value, or be forced to the trouble and expense of litigating any issue of that character.” (Italics ours.)

Quinlan v. Pew, 56 Fed. 111 at 120.

The same reasoning was invoked in *The Defender*, 201 Fed. 189 at 191, where the court says:

“The proceeding is intended for the purpose of *limiting* liability, and this presupposes that the liability to be limited might exceed the limit; that is, that there might be personal liability beyond that of the res involved. *If the statute of limitations had run against all possible claims from any cause*, the situation on this present application might show plainly that there was no reason for the exercise of jurisdiction by this court. But where an accident, which by its nature, if caused by negligence, affected a flotilla of 15 boats, it would seem that the federal court should exercise its jurisdiction, in order that, if other suits should be brought and the liability amount to more than the value of the boat, the proceeding would not be too late to protect the owner.” (Italics ours.)

The Defender, 201 Fed. 189, 191;

Delaware River Co. v. Amos, 179 Fed. 756.

This court has long since determined that the right of the shipowner to limit liability is an essential prerequisite to the right to adjudicate the claims and that as soon as it appears that there cannot be a limitation, the parties are allowed to return to their State tribunals, where their pending cases may be continued. In that case Judge Ross, speaking for the court, after finding that the petitioner was not entitled to limit liability, entered the following order:

“The judgment is reversed and cause remanded, with directions to the court below to dismiss the petition at petitioner’s cost, leaving the administratrix of the estate of the deceased, Weisshaar, at

liberty to pursue her action for damages in the state court.”

Weisshaar v. Kimball SS. Co., 128 Fed. 397 at 402.

This essential distinction between the right of the petitioner to come into admiralty to limit his liability, and the right of the injured party to keep his State trial and his jury unless the petitioner's right has been established, must be kept clearly in mind. The petitioner's right to stay in admiralty does not flow from his filing a petition in that court, but from his establishing from the facts that he comes within the Congressional privilege. This court has squarely held (144 Fed. 788, 796) that in so doing the burden of proof is on him, and not on the injured party.

Counsel urges that there might have been other claims, and that he is entitled to invoke the aid of the court to prevent a multiplicity of suits, but there is no such allegation in his petition. The mere fact that in his prayer for relief he asks that all other claims be enjoined of course tenders no issue upon the subject. If counsel relies on the possibility of other claims as establishing the quasi equitable jurisdiction of the court, even if the total is less than the fund, it must affirmatively appear in his petition. The court sitting in admiralty has a limited jurisdiction and no facts not appearing in the petition will be supplied by inference.

“ ‘No presumptions arise in favor of the jurisdiction of the federal courts’. Ex parte Smith, 94 U. S. 455, 24 L. Ed. 165. On the contrary, the

legal presumption is that every case is without their jurisdiction unless the contrary affirmatively appears. *Robertson v. Cease*, 97 U. S. 646, 649, 24 L. Ed. 1057; *United States v. Southern Pacific R. Co. (C. C.)*, 49 Fed. 297. Said Marshall, C. J., in *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885:

“ ‘The decisions of this court require that the averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments.’ ”

Central Door & Lumber Co. v. California-Atlantic SS. Co., 206 Fed. 10 and 11.

However, even had the petition alleged a number of claims, the default against all claims save the Lumber Company's made it a one claim proceeding so far as limitation is concerned. It is like the case where all the other claims are barred by statute, instanced by Judge Chatfield in the excerpt from *The Defender*, *supra*.

We submit, therefore, that, following the reasoning in both the last Supreme Court case and the *Weisshaar* case, if both tugs are liable to surrender as component parts of the petitioner's venture, and there is nothing for the court to limit, as in any event the single claim will be paid in full, the right to continue in admiralty ceases.

In our next chapter we will show that the petitioner's interest in the venture consisted of his two tugs bound together so that they furnished their combined power over a single line to the log raft, and

which must pursue the same course in bringing it across the bar, and hence that the value of both must enter into the fund for limitation.

II.

This court has squarely decided that the owner, in order to obtain limitation, must surrender all he has at risk in the venture, during the course of which the injury is inflicted, regardless of the causal participancy in the wrong doing of any particular tug or vessel constituting a part of the venture.

Judge Ross' opinion in *Short v. The Columbia*, 73 Fed. 226, has finally settled this question for this circuit. In that case the appellants, Malvina Short and Sven Anderson, were the administratrix and administrator, respectively, of the estates of two of the men killed on the barge *Columbia*. The barge, on arriving at Portland, had been injured in docking, opening her up at her bow. Later she was moved into shallow water and while there the two men were engaged in building a bulkhead to shut off the leak. The barge suddenly collapsed on account of the shifting of her load by order of her captain, and before the men could escape certain sacks of grain fell on them and they were killed. The owner of the grain, some of which was injured, also appealed.

The barge had been towed by the tug *Ocklahama* which was nearby, waiting to take her on when the repairs were completed. The lower court held that

the collapsing was due solely to the shifting of the cargo under the orders of the barge captain, with which the tug had nothing to do, and that the barge alone should be appraised in fixing the limit of liability. One of the questions on the appeal was whether the tug should also be surrendered.

The owners of the tug and barge urged, just as petitioner here claims for the *Hercules*, that as no act of the tug could be called the proximate cause of the death of the men or the loss of the grain, her value should not be included in the fund for limitation. Judge Ross, in considering this contention, says:

“The court below held that the collapsing of the barge was occasioned by the negligent shifting of some sacks of wheat by the master of the barge, and that that act of his was the proximate cause of the loss and damage in question. But no question of proximate cause, we think, arises in the case, for the reason that the tug and barge are, in law, considered one vessel, for the purpose of the voyage in question, and, whether the accident giving rise to the loss and damage be directly attributable to the acts of the master of the barge, or to those of the master of the tug, it is equally the negligence of the carrier, for which it contracted to be liable. It results that, in according the petitioners a limitation of liability without the surrender the tug *Ocklahama*, the court below was in error.”

Short v. The Columbia, 73 Fed. 226 at 238, 239.

We find it impossible to distinguish the *Columbia* from the case at bar. In both there is a contract of transportation, in both two instrumentalities were required for the transportation, in both it was claimed

that the faulty act of but one of the instruments was the sole cause of the injury, and that the value of the other should not constitute a part of the fund for limitation. In *The Columbia* it was squarely held that the acts of the tug had no causative relationship to the injury, as she was merely standing by. Surely the reasoning of that case applies *a fortiori* to the *Hercules*, who at the very moment of the loss was applying her full power to the other tug and through her to the raft. Wherever the locus of the negligence, the participancy of the tug in the venture, in the contract to tow the raft, could not be more indisputably vital.

We are unable to follow counsel's argument on page 35 of his brief, concerning the wheat on the *Columbia* as belonging to a third party. Surely as far as the contract of carriage was concerned, the owner of the wheat was the second party, and in the contracts of employment of the dead and injured men they were the second parties, just as in the contract of towage in this case, the *Lumber Company* was the second party. The *Ocklahama's* power to tow the wheat could only reach it through the barge, just as in the case at bar, the *Hercules'* power to tow could reach the raft only through the tug *Dauntless*. And here the *Hercules* was actually towing, while in the *Columbia* case, the *Ocklahama* was merely standing by!

It was not claimed in the *Columbia* decision that the agreement to transport the wheat created the status of common carrier. The obligation of the petitioner in each case is therefore the same. However, the nature of the contract as to the wheat could not affect the

decision, as the two claimants for the dead men were equally benefited. The only reason for looking into the contract is to determine what the venture was out of which the owner expected to reap his profit, and from that determine what the instrumentalities were that were engaged in it.

The fallacy underlying counsel's whole argument is this: He assumes that the ultimate factor in determining whether the value of a certain instrumentality in the venture should be included in the fund for limitation, is *whether it is itself liable in rem for the injury done*. How fallacious this is, is apparent from even a cursory glance at the decisions. For instance, in California, as in many States, a vessel is not liable *in rem* for injuries arising from the tortious killing of a person on another vessel, and yet the owner of the offending vessel can limit his liability *in personam* only by surrendering it.

The Dauntless, 129 Fed. 715.

In California the barge would not have been liable at all to any of the heirs of the deceased men, and yet even our opponent would not have the temerity to urge that it, at least, should not be surrendered.

As still stronger evidence that the liability of the vessel to the claimant has nothing to do with valuation of the fund, is the fact that in distribution of the fund no attention is paid to priorities. If the fund were simply a substitute for the ship those claimants having prior liens would take first, and if the lien claimants took the whole value, the persons without liens, such as loss of life claimants, supply men

in the home port, etc., would take nothing. Yet this court has held squarely to the contrary in a recent case where the death claimants were decreed to share *pro rata* with the cargo lien claimants.

Boston Ins. Co. v. Metropolitan Redwood Lumber Co., 197 Fed. 703 at 712.

Another illustration even more clearly shows that the liability of the ship *in rem*, is not the criterion of the size of the fund. It is elementary that the fund for limitation is determined at the end of the voyage and not at the moment when, say, the vessel in question rams another in the middle of the voyage, which she continues to her original destination. Suppose three vessels, A, B and C, each worth a million dollars: A is wrongfully rammed and sunk by the vessel B, which herself escapes unhurt. Suppose that thereafter on the same voyage B is herself wrongfully rammed by C, which also escapes, so that B's value is reduced to but \$500,000 when she limps into her port of destination. If the owner of A libels B *in rem*, her owner bonds her for \$500,000, her then value. If on the other hand, A's owner sues B's owner *in personam*, the latter, in order to limit liability, must not only surrender his vessel B, worth \$500,000, but his claim against C and her owner, worth \$500,000 more.

O'Brien v. Miller, 168 U. S. 306.

Now, there is not the slightest causal connection between C's wrongful act which gives B's owner a claim against him which in turn swells the fund for limitation, and B's wrongful act in ramming A, yet the Supreme Court compels B's owner to surrender

this personal asset arising out of the venture, if he would obtain the Congressional relief. Clearly the criterion for determining the size of the fund is not the liability of the vessel, but the owner's whole interest in the voyage and venture in which the injury occurred.

This brings us to a consideration of the words of the decision of the District Court:

“The statute providing for limitation of liability is designed for the protection of the shipowner, and the object of proceedings thereunder is to afford such protection by preventing recoveries in excess of the value of the vessel and freight pending, and distributing such value in proper proportions where there are more claimants than one. Where there is but one claimant, however, and his claim is for much less than the amount to which, the liability of the shipowner may properly be limited, there is neither danger of recovery above such amount, nor necessity for distribution among a number of claimants. If the tug Hercules is equally liable with the tug Dauntless for the loss of the raft in question, we have the case here of a single claimant for an amount much less than that to which petitioner's liability may in any event be limited.

“Both tugs being engaged *in the same venture*, at the time of the disaster, are equally liable, if there be liability at all, though the tug Dauntless was the only one attached directly to the raft.”

The Columbia, 73 Fed. 237;

Thompson Towing Co. v. M'Gregor, 207 Fed. 212;

Apostles, 118, 119.

That Judge Dooling uses the word “liable” here as meaning liable *to surrender for limitation* and not liable in a suit *in rem*, is apparent from his use of the term

“venture” and his citation of *The Columbia* case and the case of *Thompson Towing Co. v. M’Gregor*, in which the Circuit Court of Appeals for the Sixth Circuit cites the former with approval.

In the latter case there was a boiler explosion on the *Stewart*, a lighter accompanying a tug, which was the sole cause of the injuries to the claimants. The court found:

“The absence of the safety valve might well be presumed the cause of the explosion and, for the purposes of this case, I think that fact should be considered as established.”

Thompson Towing & Wrecking Assn. v. M’Gregor, 207 Fed. 209 at 211.

The tug, the *Merrick*, occupied no place whatsoever in the causal chain leading to the injury, but because she was engaged in a common venture with the lighter, it was held that her value must be included in the fund for limitation of liability. The *Merritt* was not, as the *Hercules* in the case at bar, even lashed to the other lighter at the time the injury occurred on her, but was on the other side of the grounded steamer they were both serving. At the moment of the disaster the barge was doing nothing and the *Merritt* alone was occupied in towing. While this occupation contributed to the venture in which the lighter, just as the *Hercules*, was a component unit, her towing had nothing to do with the injury to those on the lighter, just as it is claimed (sic) that the power of the *Hercules* had nothing to do with the loosening of the towline it was pulling on through the *Dauntless*. Whatever

reasoning called for the inclusion of the Merritt in the fund calls *a fortiori* for that of the Hercules.

The rule is laid down at page 214 as follows:

“They point out the necessity of studying the facts not only of the case in hand but also of the cases cited and relied on as precedents, for the purpose of identifying in each instance the offending thing, whether that be a *single or a composite instrumentality*. The particular feature, then, constantly to be borne in mind here is the mutual dependence of the Merrick and the Stewart in the work of releasing the Elwood; as Judge Addison Brown said in *The Bordentown*, 40 Fed. 687, when speaking of the Bordentown and the Winnie, although engaged in towing, they ‘*were in effect one vessel*’. Attention to a fact like this cannot be effectively diverted by allusion to the terms of employment of the Merrick and Stewart, because their *unitary characteristics existed at the crucial moment of the explosion*. We think this fact alone brings this case within the principles of the decisions relied on in the opinion below and distinguishes it from the cases claimed to be opposed to it. The existence of a similar fact in the Bordentown case was regarded as a distinguishing feature even in the Mason case, 142 Fed. 916, 74 C. C. A. 83 (C. C. A. 2d Cir.), upon which so much reliance is placed by the appellants.”

Thompson Towing & Wrecking Assn. v. M'Gregor, 207 Fed. 209 at 214.

Certainly for sole purposes of the venture, namely, furnishing power to tow the log raft on a single tow line and leading her over a certain course, no clearer example could be chosen of a “single instru-

mentality'' whose 'unitary characteristics existed at the moment of the loss of the raft'.

Counsel's attempt to claim that the basis of the decision as to the size of the fund in that case, is the separate liability of the Merrick for its fault, is answered by the fact that the Merrick would not be liable at all for the killing of workmen, as no right *in rem* exists for such tortious killing.

In relying on those two causes, it is thus clear that Judge Dooling must have referred to liability to surrender for limitation and not meant that liability *in rem* was the criterion for determining the elements of the venture to be appraised for the fund.

Counsel places great reliance on the decisions of the Second Circuit, the consolidated suits of the *W. G. Mason* and the *W. I. Babcock*, 142 Fed. 913, and the similar cases of the *Anthracite* and the *Wm. E. Cleary*, 162 Fed. 284, 168 Fed. 693, but fails to note that *these were suits in rem against each individual tug*. These were not cases of suing their owners *in personam* and their seeking to limit this personal liability by surrendering all their interests in this venture. They were cases where the only thing at issue was the participating of the individual units of the towing groups in acts occasioning the injury to other vessels. Unless the vessels were liable *in rem* the owners could not be liable at all. This is clear from the following paragraphs in *The Mason*:

“Does the fact that both vessels belonged to the same owner affect the question of *liability in rem*? If it does, it can only be because liability

in rem is coextensive with the personal liability of the owner. This may be the law in England, but it is not the law in this country as declared by the highest courts. * * *

“If, as these authorities assert, the personal liability of the owner is not an element in determining the *liability of a vessel in rem* for wrongs or torts, the decisions in *The Bordentown* and *The Columbia*, so far as they were based upon the contrary consideration, were erroneous.”

The W. G. Mason, 142 Fed. 913 at 917, 918.

It is true that there are dicta in these decisions contra to the rule laid down for this circuit in *The Columbia* and, in one at least, the court presupposes that it overrules *The Columbia*, but insofar as the decisions go off on the theory that the limit of the owner's liability is the liability of the tugs *in rem*, they are clearly distinguishable.

In the case of *The Sunbeam*, 195 Fed. 468, the Circuit Court of Appeals does apply *The Mason* decision to a loss of life claim, but does so without consideration of *The Columbia* or any of the argument made here or in that case. It cannot change the law in this circuit.

Judge Thomas' decision in *Van Eyck v. Erie Ry. Co.*, 117 Fed. 712, a District Court case also from New York, may be taken as an attempt to overrule *The Columbia*. Its reasoning was exactly that offered for the petitioner in *The Columbia* and there rejected and the present rule established for this circuit.

Neither of the District Court cases from this circuit in any way question the rule laid down in *The Columbia*. In *The Hercules*, 81 Fed. 218, Judge Morrow squarely held that the two tugs were not engaged in a common venture. The *Sea Queen* was sent out as the sole tug to tow the *Packard*. She became disabled and another tug, the *Hercules*, came out to act as her substitute. The court finds that the *Sea Queen* then lay alongside, simply awaiting repairs, while the *Hercules* towed in her place. *The Columbia* case is not even mentioned.

In *The Defender*, 208 Fed. 836, there were two tugs owned by different parties. A libel *in rem* was filed against each tug *in rem* and the suits consolidated. It was held that, as the *Fearless* was not negligent, she was not liable. *The Columbia* is not even cited, nor could it have been, as there was nothing in the case involving a single owner of two tugs who was seeking limitation of liability.

We therefore submit that, under *The Columbia* decision, it becomes a matter of indifference whether the locus of the negligence is on one or the other of these two tugs engaged in this single venture.

In our next section we will show that, from the very nature of the towage, the negligence claimed was necessarily bound up with a common use of the two tugs; and that, even under the rule of the Second District, both would be liable, if the Lumber Company can establish any liability at all.

III.

Even if the doctrine of proximate causation^{be} applied in determining the vessels to be surrendered, the Tug Company, if liable at all for the particular negligence charged, is liable for that negligence in the united operation of both tugs. *Res ipsa loquitur*, not necessarily of the negligence, but of the joint participancy of the tugs, and hence the necessity for surrender of both to obtain a limitation of liability for the negligence charged. The mere denial of such joint negligence places its existence in issue, but does not change its joint character.

It is very important under this head to note the character of the Lumber Company's claim of negligence against which the Tug Company seeks limitation. The undisputed facts admitted in the petition are (1) that as the tugs were towing in tandem, the Hercules, the leading tug, must have chosen the route; and (2) that the power of the Hercules, at the very moment the tow line pulled off the drum of the towing machine on the Dauntless, was being exercised upon that machine to its utmost.

Petition, Apostles, page 10.

Now, the claim arising out of these facts, and against which limitation is sought, is that the combination was negligent in choosing the path it did over the Columbia River Bar, a negligence in which the Hercules necessarily participated, and that the negligent addition of the power of the Hercules to that of the Dauntless, was too much for the towing machine of the latter when it reached the rough water on the bar.

It is inconceivable to us how it can be asserted that, if claim of negligence can be established at all, it is not necessarily a negligence involving both tugs. Neither the petition nor the answer to the claim alleges that there was any other negligence confined peculiarly to the *Dauntless*. On the contrary the Tug Company's answer asserts that the raft became lost for "reasons unknown to petitioner" (Apostles, page 96). Nor could it have made such an allegation, for *any* neglect of the towing machine by *any one* on the *Dauntless* was necessarily the neglect of a person having in charge the control of the combined power of both tugs.

Res ipsa loquitur.

Of course, if there were no negligence at all, then there is no liability and no occasion for a limitation of liability. But a mere denial of negligence and liability is, as we have shown, not a ground for compelling a claimant to come into admiralty and abandon his State suit already at issue and depriving him of his jury. Where, as here, it appears on the admitted facts that the petitioner, if it is liable at all, is liable for a fund larger than the amount of the single claim, no reason exists for the limitation proceeding.

The acts of the two tugs in this case bring them well within the rule of the Second Circuit as laid down in *The Anthracite*, 168 Fed. 693. There, they were lashed together, furnishing a combined power and the negligence consisted in the dominant tug choosing a wrong course.

So likewise it is squarely within counsel's interpretation of the ruling in the *Thompson Towing & Wreck-*

ing Association v. M'Gregor, 207 Fed. 214, where the court said:

“The particular feature, then, constantly to be borne in mind here is the *mutual dependence* of the Merrick and the Stewart in *the work of releasing the Elwood*; as Judge Addison Brown said in *The Bordentown*, 40 Fed. 687, when speaking of the Bordentown and the Winnie, although engaged in towing, they ‘*were in effect one vessel*’. Attention to a fact like this cannot be effectively diverted by allusion to the terms of employment of the Merrick and Stewart, because *their unitary characteristics* existed at the crucial moment of the explosion. We think this fact alone brings this case within the principles of the decisions relied on in the opinion below and distinguishes it from the cases claimed to be opposed to it. The existence of a similar fact in the Bordentown Case was regarded as a distinguishing feature even in the Mason Case, 142 Fed. 916, 74 C. C. A. 83 (C. C. A. 2d. Cir.), upon which so much reliance is placed by appellants. Again, we think it is fairly to be inferred from the opinion in the Mason Case that, while the steam tugs, the Mason and the Babcock, were engaged in towing the steamship ‘Gratwick’, they were acting in independent capacities and so did not present the fact which is controlling here.”

So far as applying power through the towing machine of the Dauntless is concerned, there was ‘mutual dependence of the Hercules and Dauntless in the work of towing the raft’. For the purpose of applying this power (always through this after towing machine) they “were in effect one vessel”. These ‘unitary characteristics continued at the crucial moment of crossing the bar at the wrong place’.

It is therefore submitted:

1. That the value of the Hercules must be included in the fund for limitation under the rule in *The Columbia* case, whether or not she participated in the negligence causing the loss.

2. That even if the rule of the Second Circuit is deemed to overrule that of the Ninth, the Hercules under the rule of the former jurisdiction *must* have participated in the negligent acts charged, and hence must be surrendered to secure a limitation of the liability flowing from these acts.

3. That where it appears that the fund must exceed the single claim, if there is any liability, and hence that there cannot in any event be a *limitation*, the injured party will be permitted to return to his pending suit in the State court and allowed the benefit of his jury in determining whether that liability exists.

Respectfully submitted,

WILLIAM DENMAN,

DENMAN AND ARNOLD,

Proctors for Appellee.

W. S. BURNETT,

Advocate.

No. 2388

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SHIPOWNERS AND MERCHANTS'
TUGBOAT COMPANY (a corporation),
owner of the Steam Tugs "Dauntless" and
"Hercules",

Appellant,

VS.

HAMMOND LUMBER COMPANY
(a corporation),

Appellee.

In the Matter of the Petition of the Shipowners and Merchants'
Tugboat Company (a corporation), owner of the Steam Tugs
"Dauntless" and "Hercules", for limitation of liability.

APPELLANT'S REPLY BRIEF.

The decision of the United States Supreme Court
in the case of

*Laura G. White v. Island Transportation Com-
pany*, 12 U. S. Advance Opinions, p. 589,

which came to hand after the preparation of appellant's
opening brief, has definitely affirmed the right of a
shipowner to invoke, where there is but one claim, the

special proceeding for limitation of liability, as accorded by the Federal Statutes and the Rules of the Supreme Court. This finally disposes, in appellant's favor, of one of the controverted questions in the court below.

We are frank to admit that the jurisdiction of a district court to entertain the statutory proceeding for limitation of liability may be seriously doubted where there is, and can be, but one claim of less amount than the value of the interest of a petitioner in the vessel, and her freight pending, required to be surrendered. In such a case, it would reasonably appear that there was nothing to limit, and, therefore, no occasion for the special proceeding and the enjoining of a previously instituted action in a state court upon the claim. Yet, no court, so far as we are aware, has directly adjudicated the question.

That, however, is not the case before this court, for, aside from the ultimate question of liability for the loss, there is in direct issue here two factors, the want of which constitutes the very condition upon which is founded the denial of the right to invoke the special proceeding in the assumed case. That is to say, if the special proceeding cannot be had in a case where there is but one claim of less amount than the value of the property to be surrendered, it is because there is nothing to limit, and, therefore, no right of limitation. On the other hand, in the cause now before this court, there is in positive controversy under the petition and

answer, the question of the identity of the vessels required to be surrendered, and of the right of limitation of liability at all. The fact, then, that the right to invoke the special proceeding in the assumed case might not lie, is not determinative of a like conclusion in the instant case.

**THE TEST OF SURRENDER IS FAULT, WHICH CAN ONLY BE
DETERMINED BY A TRIAL.**

It is the contention of appellant that the question as to whether its interest in both the tugs "Dauntless" and "Hercules", or in the "Dauntless" alone, is required to be surrendered, if there be liability for the loss of the raft, can only be settled by a trial in which shall be determined the question as to whether there was fault attributable to both, or only one, of the tugs. On the other hand, it is asserted by appellee that there can be no question of what is required to be surrendered, but that the fact of both tugs being of common ownership and engaged in the same venture pre-determines that appellant must respond for the full value of the raft, if there be liability for its loss, as the combined values of the tugs exceed the value of the raft.

The determinative fact of surrender, on appellee's theory, is that of both tugs being engaged in the same venture, irrespective of whether one alone was in actual fault.

Manifestly, if appellant is called upon at all to respond in damages for the loss of the raft, it will only be required to do so if there was actionable fault on

the part of one or both of the tugs, arising in the towage service. It is its liability, as the owner of the tugs, for such fault, against which, if at all, it is entitled to a limitation. There is, then, essentially involved the question of fault on the part of one or both of the tugs, and in determining that liability is to be limited to the value of one, or to be extended to that of both, the court must find an existing fault. If that fault is common to both, appellant must respond for their combined values; if but one was in fault, it alone must be surrendered. *The question as to whether both, or only one, of the tugs were in fault is, of necessity, however, one that can only be determined after a trial.*

It is strenuously contended by appellee that the cases of

The Bordentown, 40 Fed. 682;

Short v. The Columbia, 73 Fed. 226; and

Thompson Towing & Wrecking Co. v. McGregor,
207 Fed. 212,

sustain the proposition that the fact of the tugs being engaged in the venture, irrespective of whether fault is actually attributable to both, determines the necessity of surrendering both tugs. We confess our inability to so read the decisions, but, on the contrary, construe them to hold that because fault was attributable to both vessels, in the respective cases, the surrender of both was, in each instance, required.

In

The Columbia, *supra*,

the tug and barge, engaged upon a contract of carriage, were held to be one vessel, and, as one vessel, the

fault was regarded as that of the unit. Why were they held to be one vessel? Certainly not because they were attached to each other when the loss occurred, for they were then detached. Nor simply because they were engaged in the same venture. But, as the court carefully pointed out, by full explanation of the character of the service in which they were employed, they became, when the tug made fast and took the barge in tow, one vessel for the purpose of that voyage, *to perform the contract of carriage*, as much so as if the barge had been taken bodily aboard the tug.

That the contract of carriage was an essential element in determining the unitary character of the vessels, is concluded by the court's reference, by way of authority, to two decisions of the Supreme Court which so lay down the law.

The Northern Belle, 9 Wall. 526, 529;

The Keokuk, 9 Wall. 519.

The tug and barge were not held to be as one vessel simply because they were tug and tow, but because each was dependent upon the other, the barge furnishing the carrying capacity and the tug the motive power, in the performance of the contract of carriage. The merging of their separate characters into one, for the purpose of the voyage in performing the contract of carriage, of which one was as essential a part as the other, cannot, however, be made to support the broad proposition that two tugs, engaged upon a single towage, become one vessel simply because employed in the same venture.

In

The Bordentown, supra,

the two tugs were required to be surrendered because the act of the master of the "Bordentown", in negligently proceeding on his voyage, under unpropitious conditions, was held to be the fault of both vessels *by reason of the master's common command over them*. Both were not required to be surrendered simply because commonly owned, or attached together in the same service, *but because of a fault common to both while so operated together*. That the element of fault, common to both vessels through the common master, was the criterion by which surrender was determined, is emphasized by the care with which Judge Brown pointed out that the third tug "Willie" was not so chargeable. She was not excused alone because unattached to the tow, for if that were the measure of liability to surrender, the "Ocklahama" in *The Columbia* would not have been held. Rather, it was the question of fault, and as the negligence of the master of the "Bordentown" could not be attributed to her, her surrender was not required.

So, in

Thompson Towing & Wrecking Co. v. McGregor,
supra,

the "Merrick" and the "Stewart" were required to be surrendered because the "Stewart" was interdependent upon the "Merrick", as both were engaged in the same service, attached to each other through the "Elwood", and *because the negligence, which caused the loss, was that of the local manager having supervision of both*

vessels. The surrender of the "Merrick" and "Stewart" was not required simply because they were engaged in the same venture, or because attached to each other. Further merging of identity so as to bring home to both, the fault which caused the loss, was held essential. This could not be more clearly pointed out than by the fact that though other vessels of the same owner were engaged in the same venture, their surrender was not required. The fact that they may, perhaps, not have been attached to the "Stewart" at the time of the accident is not decisive, as demonstrated by *The Columbia*.

The Circuit Court of Appeals referred to this exemption of surrender as a complete answer to the contention made by counsel that the doctrine of the district court's decision would involve a common liability for steamer and barges in a tow, regardless of the question of the fault of the respective vessels; that, in relation to the wrecking business, it would involve all tugs, pumps, lighters, etc., merely because they happened at some time to have been engaged upon the release of the same vessel and irrespective not only of their fault but of the extent or character of the service in which they were engaged, or even the terms of their employment; and in general that it would practically nullify the right of the owner to limit his liability to the value of the vessel or vessels *actually responsible for an injury*, and extend that liability to all other vessels and property which such owner happened to have, and which chanced to be directly or indirectly connected with the expedition upon which the accident occurred.

The very fact that the Circuit Court of Appeals took occasion to expressly disaffirm that the district court's decision would have the effect inferred, is the strongest dissent that can be made to the assertion that the case upholds a rule which would require the surrender of two tugs simply because they were engaged in the same towage venture.

The determination of the fault, and the identification of the vessel committing the fault, is the test of surrender. The necessity of this conclusion is made obvious by the following statement:

“It is strenuously argued by counsel that to hold the ‘Merrick’ would be to establish a rule that would be most injurious to the shipping interests of the Great Lakes. The reason assigned is stated in the margin. The most obvious answer to this complaint is that although the appellants furnished at least four vessels to release the ‘Elwood’, the effort made in the court below, as we have already said, to hold any of them except the ‘Merrick’ and ‘Stewart’ failed. We should add that the appellees sought also to have the ‘Elwood’ and her cargo, held, but the application was denied. These eliminating processes of the trial court do more than to illustrate the error of the criticism made of the decision. *They point out the necessity of studying the facts, not only of the case in hand, but also of the cases cited and relied on as precedents, for the purpose of identifying, in each instance, the offending thing, whether that be a single or a composite instrumentality.*” (Italics ours.)

That district Judge Dennison likewise considered that surrender must be conditioned upon actual fault being attributable to the vessel, or vessels, required to be

surrendered, is patent from the following excerpt from his opinion:

“The situation would be different if the negligent act which is to condemn the particular guilty rem, had been the independent act of an agent who had to do with the ‘Stewart’ only (as in the Mason and similar cases). Here, however, the damage (d) claimant (s) count upon the negligence of the agent, in charge of both boats, who equipped and sent out the defective boiler, as part of a working unit, and the damage happened at a moment when these possibly separable parts were, in fact, united.” (207 Fed., at p. 213.) (*Italics ours.*)

The controlling element, therefore, by which all of the vessels in the foregoing cases were required to be surrendered, was that of fault attributable to each of the vessels, and not simply that they were engaged in the same venture. The cases are thus not out of accord with the decisions in

Van Eyken v. Erie R. Co., 117 Fed. 712;

The Anthracite, 162 Fed. 384;

The W. G. Mason, 142 Fed. 913; and

The Sunbeam, 195 Fed. 468.

For, in all of these cases, the vessels required to be surrendered were each found to be in fault, the specific act of fault being pointed out by the court. In the *Van Eyken* case, surrender of the barge was not required, because “it was not part of the wrongful act”, the fault being that of the tug alone. In *The Anthracite*, both tugs were in fault for the negligence of the master of the “Anthracite”, who controlled their navigation. They were held to come within the rule in *The Arturo*, 6 Fed. 308, and yet, in that case, Circuit Judge Lowell

expressly said, in holding both tugs liable for joint negligence:

“If, therefore, one tug was wholly in fault, as by a defect in her machinery or the like, she alone would be responsible.”

In *The Mason*, the tug “Babcock” was not required to be surrendered because not in fault, although she was equally engaged with the tug “Mason” in the same venture, and as much attached to the “Mason”, through the steamer in tow, as was the “Stewart” to the “Merrick”, through the “Elwood”.

It is impossible, therefore, to avoid the conclusion that *the test of the requirement of surrender is that of fault on the part of the vessel*, through the conduct of master and crew. The purpose of the Act is to limit the liability of the shipowner in respect of claims arising out of the conduct of the master and crew, whether the liability therefor be non-maritime or maritime, or whether the remedy be *in rem* or *in personam*.

Butler v. Boston & Sav. S. S. Co., 130 U. S. 527;
32 L. Ed. 1017;

Richardson v. Harmon, 222 U. S. 96; 56 L. Ed.
110.

The liability against which the Act grants at least partial immunity, is one arising out of ownership in a vessel, and liability as owner can not arise unless there be fault on the part of the vessel, her officers or crew. It necessarily follows, therefore, that a vessel, or her master or crew, must be found in fault, as the condition precedent to requiring an owner to respond to the value of his interest in the vessel.

The question is thus presented: how is such fault to be determined? Certainly in but one way,—by a trial upon the merits, just as the Supreme Court pointed out in the case of *Laura G. White v. Island Transportation Company*, supra, that the question as to whether the petitioner was entitled to the benefit of the limited liability act, in issue under the pleadings, was to be settled by a trial.

So it is in this case. The question as to whether appellant, if liable for the loss of the raft, shall be required to surrender both the “Hercules” and the “Dauntless”, or only the vessel in fault, can only be settled by a trial upon the merits, in which shall be ascertained and determined the fault, if any, and the identity of the tug causing the loss.

It is incorrect for appellee to say that it is appellant’s contention that the ultimate factor in determining whether the value of a vessel should be included in the fund is whether it is itself liable *in rem* for the injury done. We are not unaware that actions *in rem* cannot be maintained for many injuries for which limitation of liability is granted by the statute, and that the form of action by which indemnity for a wrong may be secured has nothing to do with the shipowner’s right of limitation of liability. But we do say that the ultimate factor is whether or not the vessel or vessels, her officers or crew, are in fault, whether the tort be maritime or non-maritime, or whether there be a right of action *in rem* or only *in personam*. It is the liability of the shipowner, as owner of the vessel, which is limited against a liability for tort committed

by a vessel or vessels, her officers or crew. But the criterion for determining the size of the fund is not as appellee asserts, the owner's whole interest in the voyage and venture, but is the shipowner's interest in the vessel and her freight pending. If the owner have a claim over against another vessel or owner, for damages to his vessel occurring on the voyage, on which limitation is sought, such claim must be surrendered on the authority of

O'Brien v. Miller, 168 U. S. 306,

because such claim or right of action is to be considered as a substitute for the ship itself, as representative of the ship and freight. While, however, such criterion is a factor in determining the size of the fund, if a fund is required to be distributed, it does not determine whether the owner must respond for the value of the vessel and her freight pending. That is dependent upon the question as to whether there was fault on the part of the vessel, her officers or crew.

There is put in issue by the petition and answer the question as to whether the loss of said raft, and all other damages and injuries, whether of persons or of property, done, occasioned, and incurred upon said voyages of said tugs, was done, occasioned or incurred by the neglect of said tugs or the officers or servants of appellant. It is true that the answer of appellee to the petition alleges a joint negligence on the part of both tugs in proceeding through the wrong channel, and in that the towing machine of the "Dauntless" was not strong enough to withstand the combined strain of the pulling power of both tugs. Inasmuch as affirma-

tive allegations of an answer are deemed denied under admiralty practice, the status of the pleading but demonstrates that the question of fault can only be determined by a trial upon the merits. With such a controversy framed by the pleadings, is appellant to be foreclosed from adducing proof to establish its implied denial of joint negligence on the part of both tugs, and in support of its averment of entire want of negligence on the part of either? Assuming the proposition to be sound, that the court is without jurisdiction if there be but one claim in excess of the value of the vessel required to be surrendered, the pleadings effectively put in issue the question of jurisdiction, and yet where that was done in the case of *Laura G. White v. Island Transportation Company*, supra, the Supreme Court said:

“The questions of fact so presented were to be settled by a trial, and this was so whether the facts were jurisdictional or otherwise.”

It is no answer to say that the allegations of appellee's answer to the petition, and its complaint in the state court, only charges a joint negligence, for that fact would not foreclose appellee from taking advantage of any separable negligence that might be established on the part of either tug. It is true that negligence on the part of either tug is not admitted by appellant, for it denies any negligence, but that fact will not prevent a full hearing upon the merits, and if upon the trial separable negligence were shown, appellee would rightfully claim its right of recovery therefor.

It follows that the district court erred when it held that both tugs were liable simply because engaged in the same venture at the time of the disaster. Nor can it be said, as counsel would construe the decision, that the court only meant liable to surrender, for the words of the court are free from ambiguity in that regard. The error of the court was in denying appellant the right to meet, on a trial, the issue as to whether neither, or one, or both tugs were in fault for the loss of the raft. The fact that the towing power of both tugs was applied to the hawser from the "Dauntless" to the raft is not, of itself, decisive of the fault of either, or both of the tugs, for the cause of the loss of the raft may have been entirely independent of any negligent application of the power of the tugs. What the cause was would be disclosed on a trial, and then the question of the identity of the vessel, for the value of which appellant must respond, if there be fault, could be properly determined. But without a trial upon the merits, in which shall be settled the question of fault, appellant will certainly be denied the right granted it by the statute.

Furthermore, the pleadings put in issue the question as to whether appellant is entitled to a limitation of liability at all, by reason of priority in, or knowledge of, the cause of the loss. That it is deemed essential to the determination of the rights of the parties is evidenced by the fact that it is appellee's denial, which puts it in issue. If it should be held that appellant is not entitled to the benefit of the Act, then the ruling of this court in

Weisshaar v. Kimball S. S. Co., 128 Fed. 397, would become applicable, but on no other ground. The question of the right of limitation under the Act has been held to be one of admiralty cognizance.

The Lotta, 150 Fed. 219.

It can only be determined, however, by a trial which shall disclose a negligent cause of the loss, within the privity or knowledge of appellant.

We, therefore, respectfully submit that the decision of the lower court should be reversed, with instructions to proceed to a trial upon the issues made by the pleadings, in accordance with the rules and practice in limitation of liability proceedings provided.

Dated, San Francisco, California,

July.....18th, 1914.

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellant.

No. 2388

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE SHIPOWNERS AND MERCHANTS'
TUGBOAT COMPANY (a corporation),
owner of the Steam Tugs "Dauntless" and
"Hercules",

Appellant,

vs.

HAMMOND LUMBER COMPANY
(a corporation),

Appellee.

REPLY BRIEF OF HAMMOND LUMBER COMPANY, APPELLEE.

Appellant takes two positions with regard to the right of the District Court to deprive us of our jury trial and state tribunal in the case now at issue in Oregon, both of which we deem patently fallacious.

These are that:

1. The fault of the individual vessel determines the necessity for its surrender, thus denying the plain holding by this court in the "Columbia" case that an instrumentality which was immediately engaged in the ven-

ture, as a tug furnishing its motive power at the time of the alleged negligence, must be surrendered regardless of its causal relationship to the loss;

2. Although the single claim must exceed the fund to confer jurisdiction for limitation, this jurisdictional fact need not be alleged and the court must hear the cause though no jurisdiction is pleaded, because it *may* be shown at the trial that the claim exceeds the fund and the pleadings *then* amended to set it forth.

The latter claim is novel to our experience and we are filing this short reply to meet it, incidentally touching on the first point.

I.

The surrender of the tug does not depend on its individual fault, but on its “unitary identification” with the other vessel for the purpose of the voyage.

Under the heading “The Test of Surrender is Fault”, counsel asserts that unless the “Hercules” and “Dauntless” each participated in the fault, both need not be surrendered, and claims that *The Columbia* does not oppose this doctrine.

The simplest method of answering counsel’s contention is to place his words and the court’s in parallel columns.

COUNSEL’S STATEMENT.

THE COURT IN THE
COLUMBIA.

73 Fed. 223 at 238.

“We confess our inability to so read the decisions, but on the contrary, construe them to hold that because *fault was attributable to both vessels*, in the respective cases, the surrender of both was, in each instance required.”

“The court below held that the collapsing of the barge was occasioned by the negligent shifting of some sacks of wheat by the master of the barge, and that that act of his was the proximate cause of the loss and damage in question. *But no question of proximate cause, we think, arises in the case, for the reason that the tug and barge are, in law, considered one vessel, for the purpose of the voyage in question, and, whether the accident giving rise to the loss and*

damage be *directly attributable to the acts* of the master of the barge, or to *those of the master of the tug*, it is equally the negligence of the carrier, for which it contracted to be liable.

Nothing could be clearer than that the court did not make the Ocklahoma's "fault the test of her surrender". On the contrary, it held squarely that the Ocklahoma, with no physical causal connection with the death of the men at all, must be surrendered because for the "*purpose*" of the voyage, she is to be considered as one vessel with the barge, being one of the two conjoint instrumentalities with which the carrier was carrying out its contract of transportation. It is participancy in the venture, i. e., the contract of transportation, and not participancy in the fault, which determined whether the tug Ocklahoma should be surrendered.*

Applying this test, can there be any question that the Hercules, which was a unit with the Dauntless in furnishing the towing power called for by the agreement for towage, participated in the contract for transportation in the same way that the Ocklahoma did in the Columbia case? We submit that every reason for

* Counsel has evidently abandoned the contention advanced by him at the argument, that the owner, in the Columbia case, was towing the barge and wheat as a common carrier, and hence that a higher obligation was placed on him there, than in towing the log raft. The record fails to state any facts showing that the Columbia was acting as a common carrier. On the contrary it is apparent that there was but a single consignment of wheat constituting the entire cargo. (The Fri, 154 Fed. 333.)

surrendering the tug Oklahoma to pay the claims for the men killed on the Columbia, to which the tug was not even attached, applies *a fortiori* to the Hercules, which was attached to the raft and exercising her full power at the moment of the negligence charged.

From one point of view this question is more or less academic, for as the claim in this case is pleaded, it states a tort necessarily involving the joint control of both vessels and makes our recovery necessarily require a surrender of both, even on the theory of the most extreme of our opponent's cases. In our next section we show that with this identification of the two tugs appearing in the pleadings, the jurisdiction for a limitation of liability necessarily fails.

II.

The single claim must exceed the fund to confer jurisdiction for limitation of liability. This jurisdictional fact must affirmatively appear, and the court cannot hear the cause when such jurisdiction is not pleaded, merely because some other tort not pleaded may be shown at the trial and the pleadings then amended to allege the jurisdictional facts.

In our opening brief we have shown that we could recover on our claim solely if we showed that there was a negligence in the joint control of the two tugs. That is to say, there will be no liability at all to limit unless we establish either that there was negligence on the part of the person in charge of the power of *both* tugs or negligence on the part of the navigator who chose the course of *both*.

Counsel ignores this contention entirely and prefaces his brief with the bold assertion that "there is in positive controversy under the petition and answer the question of the identity of the vessels required to be surrendered". A careful examination of the actual controversy between the petitioner and the Lumber Company we feel will show this assertion entirely unwarranted.

The petition gives a full account of the method in which the two tugs were towing the raft at the time of the disaster. They were towing *in tandem*. All the power of the Hercules was exercised on the towing machine of the Dauntless, and hence *ex necessitate* any

negligence with the latter's towing machine, whether in its original power or its maintenance or manipulation, was a negligence in applying the power of the Hercules to the log raft.

Our contention is that this machine which thus transmitted and regulated the power of *both* tugs, was not strong enough to regulate and transmit this combined power; that the cable to the log raft, through which this joint power was applied, was improperly fastened to the towing machine; that the passage chosen for the course of these jointly operating vessels was improper, and its currents added a strain to their joint strain; that the lead tug had control of the following tug, and as it did not keep in line with it, pulled it to one side so that the line to the raft, by reason of this want of co-ordination of the two tugs, became alternately slackened and subject to strain, whereby control of the raft was lost; and that as a result of these, the line carrying the joint power of both tugs was pulled off from the drum of the Dauntless, the log raft lost the power of both tugs and was wrecked on the spit.

Every allegation in our claim was as to a negligence, either of the Dauntless in transmitting the power of the Hercules to the raft, or of the Hercules in improperly creating and applying power which she first must *put into* the Dauntless before it could reach the raft. There is not a single act alleged which is not based on what is called in the Second Circuit the "unitary characteristic" of the two tugs.

Thompson Towing Co. v. McGregor, 207 Fed. 209
at 211.

The answer to our claim does not attempt to set up a defense that the negligence, if any, was confined to but one tug. While admiralty allows such an alternative traverse, it is *apparent that, from the very nature of the combination of tugs, neither could do anything affecting the line to the log raft* without also involving the other's relation to the log raft. So far as they affected the raft, they were more interdependent than the Siamese twins. We therefore find the petitioner denying any negligence whatsoever.

In the case of *Thompson Towing Co. v. McGregor*, 207 Fed. 209, the District Judge points out that

“The damage claimant counts upon the negligence of the agent in charge of both boats, who equipped and sent out the defective boiler, as part of a working unit, and the damage happened at a moment when these possibly separate parts were, in fact, united.”

Thompson Towing Co. v. McGregor, 207 Fed. at 213.

It is what the claimant “counts upon” which determines the controversy and here, as in that case, the Lumber Company counts upon the negligence of the “agent in charge of both boats” who improperly combined their power and chose their course, and the negligence of those on each boat which could affect the raft only by affecting the other's relation to the raft.

Petitioner's general allegation that the Hercules did not participate in the acts causing the loss, yields to his specific allegation that it was exercising its power on the raft (10) through the Dauntless, at the moment the tow line transmitting the joint power was torn from

the combination. On petitioner's own statement of the case, we cannot recover on the tort alleged without involving the Hercules. Petitioner alleges that this loss of the joint power of the two tugs was without negligence, we assert that negligence caused it, but in either event what was lost was the *joint* power.

Counsel agrees, at page 2 of his reply, that the District Court has jurisdiction to limit liability only where the fund is less than the claims. It is elemental that in the Federal Court such jurisdictional facts must affirmatively appear. They cannot be supplied by inference from other allegations, or by the requests of the prayer.

Central Door Co. v. California-Atlantic SS. Co.,
206 Fed. 10 and 11, and cases at page 9 of our opening brief.

The absence of any allegation of fact that there was *separate negligence of the tugs, or of any claim under which the Lumber Company could recover against petitioner on the theory of such separate negligence*, defeats the jurisdiction of the court.

Counsel suggests that although the negligence we rely on in our pleadings is exclusively joint in its nature, still the court has jurisdiction, because some other kind of negligence *may be* discovered at the trial which will be confined to but one tug, and hence satisfy the jurisdictional requirement that the fund shall be less than the claim.

That we are not doing an injustice to our able opponent in thus characterizing his contention, we quote his own statement:

“It is no answer to say that the allegations of appellee’s answer to the petition, and its complaint in the state court, only charges a joint negligence, for that fact would not foreclose appellee from taking advantage of any separable negligence that might be established on the part of either tug. It is true that negligence on the part of either tug is not admitted by appellant, for it denies any negligence, but that fact will not prevent a full hearing upon the merits, and if upon the trial separable negligence were shown, appellee would rightfully claim its right of recovery therefor.”

In other words, on a general demurrer or plea to the jurisdiction, the petitioner may say, “true, jurisdiction does not appear, but, nevertheless, the court must try the case, because it may appear at the trial and the pleadings amended so as to then show jurisdiction”.

It is possible that if, at the trial, there were shown an entirely different cause of action, consisting of a tort which was confined to one tug, the liberality of admiralty pleadings would permit an amendment to conform to the facts and jurisdiction might *then* be shown. This, of course, cannot be shown, because if petitioner be liable at all, it would be for the negligence of some employee, who thus caused the severance of the power of *both* tugs from the raft. But, even if such severable negligence were a possibility, petitioner’s faith in the proof of something which he denies and which his opponent does not allege, and in the liberality of the court in amendment, does not seem a satisfactory substitute for jurisdictional averments.

It is therefore submitted that, even if the test of surrender of both tugs is their joint fault, there is no

jurisdiction shown for a limitation proceeding, because there can be a recovery under the pleadings only if there is joint fault, and if there is joint fault the fund must exceed the claim. The judgment of the court must be either no liability, or no limitation of liability, a controversy in which the state court alone is concerned. We therefore should be permitted to go on with the trial of our case now at issue in Clatsop County, Oregon.

WILLIAM DENMAN,

DENMAN AND ARNOLD,

Proctors for Appellee.

W. S. BURNETT,

Advocate.

No. 2388

IN THE

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TUGBOAT COMPANY (a corporation),
owner of the Steam Tugs "Dauntless" and
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In the Matter of the Petition of the Shipowners and Merchants'
Tugboat Company (a corporation), owner of the Steam Tugs
"Dauntless" and "Hercules", for limitation of liability.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The Shipowners and Merchants' Tugboat Company,
appellant and petitioner herein, respectfully requests
a rehearing in this cause.

The court states in its decision that it thinks that enough is alleged in the appellant's petition to show that if either tug was liable to surrender both were. The court apparently assigns three reasons for this opinion, for it immediately states:

(1) "It appears therefrom that both tugs were engaged in a common venture,"

(2) "that both were exerting a strain upon the hawser when it parted,"

(3) "and that the 'Hercules' as the leader of the tandem of tugs must necessarily have participated in the selection of the route and the direction of the movement of the tugs and tow."

We respectfully submit that the decision errs:

First, in that it cannot be supported upon the first ground, that of the tugs engaging in a common venture, as alone sufficient, but that actionable fault must be attributed to both tugs;

Second, in that the court is mistaken when it states that the hawser parted; and

Third, in that there is no allegation of the petition showing that the selection of the route or the direction of any movements common to both tugs and tow contributed as a fault to the loss of the raft.

I.

It is not our intention to extensively review the cases already cited to the court on the hearing, but we ask the sufferance of the court to point out that in none of them has the fact that two vessels were engaged in the same

venture been held alone sufficient to require the surrender of both vessels in limitation proceedings. In every instance of which we are aware, where surrender of both vessels was required, *it was because of fault attributable to both*. Certainly this was true of the decision in

Thompson Towing & Wrecking Ass'n v. McGregor, 207 Fed. 209,

cited with approval by this court, for how could it be more clearly pointed out than in the following excerpt from the opinion of the Circuit Court of Appeals?

“It is strenuously argued by counsel that to hold the ‘Merrick’ would be to establish a rule that would be most injurious to the shipping interests of the Great Lakes. The reason assigned is stated in the margin. The most obvious answer to this complaint is that although the appellants furnished at least four vessels to release the ‘Elwood’, the effort made in the court below, as we have already said, to hold any of them except the ‘Merrick’ and ‘Stewart’ failed. We should add that the appellees sought also to have the ‘Elwood’ and her cargo, held, but the application was denied. These eliminating processes of the trial court do more than to illustrate the error of the criticism made of the decision. *They point out the necessity of studying the facts, not only of the case in hand, but also of the cases cited and relied on as precedents, for the purpose of identifying, in each instance, the offending thing, whether that be a single or a composite instrumentality.*” (Italics ours.)

The District Court had already proceeded upon the same theory, as so unmistakably appears from the following statement of Judge Dennison:

“*The situation would be different if the negligent act which is to condemn the particular guilty rem, had been the independent act of an agent who had to do with the ‘Stewart’ only (as in the Mason and similar cases.) Here, however, the damage (d) claimant (s) count upon the negligence of the agent, in charge of both boats, who equipped and sent out the defective boiler, as part of a working unit, and the damage happened at a moment when these possibly separable parts were, in fact, united.*” (p. 13.) (Italics ours.)

This necessity of identifying the “offending thing” is further emphasized by the fact that the court required the surrender of the “Stewart” and the “Merrick” alone, although at least four vessels were engaged in the same venture of releasing the “Elwood”. It was not, however, the fact of “common venture” which caused the surrender of the “Stewart” and the “Merrick”, but that of fault attributable to them, and not the fact of both tugs engaging in the same venture.

The same principle forms the basis of the decision in

The Bordentown, 40 Fed. 682,

for Judge Brown was careful to state in the very excerpt which this court quotes in its opinion that the negligence for which the tugs were responsible *was that of the common head*, the master who controlled the navigation of the tow. Of what concern was it that both boats were in control of the same master who committed the fault, if it was not that this fault was attributable to both? Even without this common negligence, they were engaged in the same venture. The very fact, then, that Judge Brown took occasion to

bring out so plainly the common fault demonstrates that attributable fault was the test he was applying.

Similarly in

The Sunbeam, 195 Fed. 468.

This court pointed out this distinction in its interpretation of the decision in

The W. G. Mason, 142 Fed. 913,

when it said:

“The ‘Mason’ was exonerated for the reason that she had nothing whatever to do with the signalling of the tow.”

Both the “Mason” and the “Babcock” were engaged in the same venture, “joint undertaking” as this court characterizes it, of towing the steamship “Gratwick”, but each was acting independently of the other in doing a distinct part of the work. If, therefore, the fact of the two tugs being engaged in the same venture was the test, why should not this court disapprove of *The Mason* decision? But it does not, simply because something more than a “joint undertaking”, “common venture”, is necessary to surrender, to wit, fault attributable to the vessels engaged. The “Babcock” was not shown to have been in fault; hence her surrender in limitation was not required, notwithstanding her participation in the joint undertaking.

To the same effect is

The Anthracite, 168 Fed. 693,

where the Circuit Court of Appeals for the Second Circuit succinctly pointed out in the following language,

the same distinction as made by this court, in citing the case with approval:

“The Mason was held because, in doing her part of the work, she committed fault. The Babcock was exonerated, because she had nothing at all to do with that part of the work (the signalling of the tow) in which the fault was committed.”

“Here the facts are different. The fault was in steering, rounding to so carelessly as to bring the tow against the rock. The master of the ‘Anthracite’ directed the steering, and the master of the ‘Cleary’ submitted herself entirely to her commands. There was no independent action. In the steering both participated. * * * Practically for the time being, the master of the ‘Anthracite’ was the master of the ‘Cleary’, and the latter participated in the act—improper steering—which caused the catastrophe.”

The same rule was applied in

Van Eyken v. Erie R. Co., 117 Fed. 712.

Surrender of the tug was required because in fault for the collision; *surrender of the barge was not required because no fault was attributable to her as a primary agent*, yet both tug and tow were of a common instrumentality and engaged in the same venture.

It is to us unanswerable and we frankly believe this court to be of the same opinion, that the test of surrender is not alone the fact that two vessels may be engaged in the same venture, but that fault attributable to both, is the essential criterion. How otherwise can the decision of the Circuit Court of Appeals for the Second Circuit in *The W. G. Mason*, and *The Anthracite* be reconciled with each other or that in *The Mason* with the ruling of the Circuit Court of Appeals for the

Sixth Circuit in *Thompson Towing & Wrecking Ass'n v. McGregor*? If "common venture" were the test, then surrender of the four vessels engaged in the releasing of the "Elwood" would have been required in *The Thompson* case, for they were as much a part of the "same venture" as the "Ocklahama" and the barge in the case of *The Columbia*. Similarly, the tugs "Mason" and "Babcock" were as much a single instrumentality and engaged in common venture as the "Stewart" and the "Merrick" in *The Thompson* case, for in both instances the two vessels were not made fast to each other but to an intervening vessel. Common venture would have thus necessitated the surrender of the "Babcock" as well as the "Mason", or the cases are not in accord. So with *The Bordentown* and the *Van Eyken* case. The "Winnie" and the "Bordentown" were no more a single instrumentality or part of a common venture than were tug and barge in the *Van Eyken* case, and the latter were certainly more so than the "Ocklahama" and the barge in *The Columbia*.

These various decisions cannot be reconciled with each other upon any other theory than that in each the court applied the test of attributable fault in determining whether the surrender of any given vessel was required. Adjudged then by that principle, however, and every case is consistent with the others. It is the basis of each decision, otherwise the various courts would not have been so careful in each instance to identify the offending thing.

Inasmuch as this court was impelled to say that the decisions in *The Anthracite* and *Thompson Towing and Wrecking Ass'n v. McGregor* are in point with the case at bar, it must have intended to hold that "attributable fault" is the test of surrender and not the fact alone of engaging in the same venture. Only upon this theory can this court's decision in *The Columbia* be reconciled with the decision of the other courts. That such was the test which this court understood it was applying in *The Columbia* is evidenced by its later decision in

The San Rafael, 141 Fed. 270.

Although the "San Rafael" and the "Sausalito" were not a single instrumentality, or engaged in the same venture, the court held that both vessels had to be surrendered as a condition to the right of the owner to invoke the statutory right of limitation of its liability. Fault attributable to both the "San Rafael" and the "Sausalito" was the reason of the rule requiring the surrender of petitioner's interest in both vessels, and this rule must have then been this court's interpretation of the decision in *The Columbia*, for that case is there cited as the supporting decision, and it still remains the rule by the unanimous decision of all the courts.

We, respectfully submit, therefore, that the decision of the District Court cannot be sustained alone upon the ground that, on the occasion of the loss of the raft, both tugs were engaged in the same venture. If such, perchance, was the intended ruling of this court, we submit that it was erroneous and not in accord with the settled principles established in other cases.

II.

If we are right in our statement of the rule that there must be fault attributable to both vessels to require their surrender as a condition to the owner's right of limitation of liability, the inquiry is pertinent as to whether the petition herein shows such common fault, if there be fault at all.

We read the court's opinion as, in effect, holding that, if either tug was liable to surrender, both were, because it appears from the petition that both were exerting a strain upon the hawser when it parted. The fact of their engaging in common venture is not alone sufficient to require their surrender; there must have been mutual fault. The fault, if any, therefore, which the court on its interpretation of the petition, would attribute to both vessels must have been the exerting of a strain by both tugs upon the hawser when it parted. If it were the fact that the loss resulted from the hawser parting, and the latter was caused by the negligent straining of both tugs, then undoubtedly the surrender of both would be required as fault would be attributable to both. *But the petition does not show that the hawser parted; in this the court is in error.*

The petition distinctly states:

“That said tugs continued pulling upon said raft until after it passed the black buoy off Peacock Spit, *when suddenly and without warning said raft pulled the towing hawser off the towing machine on the tug ‘Dauntless’*, and upon so being freed, drifted into the breakers on Peacock Spit, and became a total loss.”

It nowhere appears that the loss of the raft, even if brought about by a cause for which petitioner would be liable, was caused by a strain exerted by both tugs parting the hawser. The petition does not aver a strain by the tugs which caused the hawser to part, but alleges that suddenly and without warning *the raft pulled the towing hawser off the towing machine* on the tug "Dauntless".

We most respectfully represent, then, that the court was mistaken when it found that it appeared from the petition that both tugs were exerting a strain upon the hawser when it parted. If this was not the fact, how can it be said, then, that if either tug was liable to surrender, both were? Surrender can only be predicated upon fault. While such fault, if it had been that a strain effected by both tugs causing the hawser to part, might have required a surrender of both, still this court cannot say that such fault would equally exist on the part of both tugs if the raft was, perchance, lost through some negligence which might have caused the raft to pull the hawser off the towing machine. The distinction lies in this; that the court apparently assumes that if there was liability upon either tug, it was because of a strain applied by both tugs which caused the hawser to part; on the other hand, the petition avers that the raft pulled the hawser off the machine, and this, even if negligently brought about, may or may not have been caused by any negligence on the part of the "Hercules". If there had been negligence in the strain, then the court's assumption might not be open to question; but as the petition does not show

such common strain, and parting of hawser, it cannot be said that the loss of the raft, if caused by its pulling the hawser off the towing machine, was necessarily caused by joint negligence of both “Hercules” and “Dauntless”. It might well be that the evidence would show the negligence, if any, to be alone attributable to the “Dauntless”, for the towing by the “Hercules” would not necessarily have caused the raft to pull the hawser off the machine. If it were only so attributable, then, on the authority of all the cases the “Dauntless” alone would be required to be surrendered. This can only be established by a trial upon the merits.

We respectfully submit, therefore, that the conclusion by the court that if there was fault at all, it was attributable to both tugs, is based upon the mistaken premise as to the allegations of the petition. On the contrary, if every effect be given the averments, it cannot be found that fault, if chargeable to one tug, was necessarily attributable to both. Without such possible inference of mutual fault from the allegations of the petition, we respectfully submit that the court is in error.

III.

As a third reason for holding that if either tug was liable to surrender, both were, the court states that it appears from the petition that the “Hercules” as the leader of the tandem must necessarily have participated in the selection of the route and the direction of the movements of the tugs and tow. Granting that this

deduction from the averments of the petition is sound, did the fact of such participation on the part of the "Hercules" in the selection of the route and the direction of the movements of the tugs and tow, necessarily show that it caused or contributed to the pulling of the hawser off the towing machine by the raft. If so, how, may we ask? On the contrary, it did not, for it may well have been that the route and movements of tug and tow had nothing to do with any negligence which resulted in the raft pulling the hawser off the machine. It is certain that it did not necessarily have that effect.

Unless such pulling of the hawser from the towing machine was necessarily caused or contributed to by the "Hercules" in such selection of route and direction of the movements of the tugs and tow, it is erroneous, we respectfully submit, for the court to say, as it does in effect that if fault on that ground was attributable to either tug, it was attributable to both. To be attributable to both, negligent acts or omissions on the part of both must have conduced to the loss. It certainly does not appear that the participation of the "Hercules" in the selection of route and direction of movement of tugs and tow necessarily had anything to do with the pulling off of the hawser by the raft. Without such fault, surrender of the "Hercules" could not be required. The engaging in a common venture was alone not sufficient.

We respectfully submit, therefore, that the court erred in asserting that fact of participation by the "Hercules" in the selection of route and direction of movement of tugs and tow, as shown by the petition,

established that if one tug was liable to surrender, both were.

IV.

With none of the cases holding that the fact of engaging in a common venture is alone sufficient to require a surrender of two or more vessels, where one alone is at fault, but with all of the decisions adhering to the fundamental principle that surrender of any vessel must be conditioned upon fault being attributable, to it, we respectfully submit that the court erred in sustaining the decree of the district court in the absence of some averment in the petition showing fault necessarily attributable to both the "Hercules" and the "Dauntless". The fact that no such fault is shown should not deprive appellant of its right to the statutory limitation of liability. The rules of the Supreme Court, rule 56, expressly provide that in the proceedings the owner shall be at liberty to contest his liability or the liability of the vessel, providing that in his petition he shall state the facts and circumstances by reason of which the exemption is claimed. This appellant has strictly done by stating the version of the cause of the loss. Is it now to be denied the right of such limitation in this court because it does not allege negligence alone on the part of one tug? If so, then it would necessarily follow that to obtain such right of limitation, liability to some degree would have to be confessed. The court would, by the enforcement of any such doctrine, set aside rule 56 of the Supreme Court, permitting a contest of liability.

Liability can only be contested if denied; if denied, the petition will not show liability on the part of any vessel to the venture. It follows, therefore, that if a shipowner is to enjoy the rights granted by statute and by Supreme Court rule, his petition will contain no allegation showing negligence attributable to his vessel, whether there be one or more engaged in the venture. This is precisely what appellant has done in the case at bar. The court cannot, therefore, hold that the petition is insufficient to confer jurisdiction upon the District Court because it does not show that the "Dauntless" is alone liable.

The question of the liability of appellant for any act of the "Dauntless" is an issue upon which appellant has the right of trial in this proceeding.

It surely cannot be the intent of this court to deny to appellant the right to have its right of limiting its liability to the value of the "Dauntless", tried. If the evidence upon a trial should show that the "Dauntless" alone committed some fault which caused the hawser to pull off the towing machine, this court would certainly not say that the "Hercules", not participating in the fault, would also have to be surrendered. If not, then appellant is entitled to have each question of fault, and the right to limit its liability to the value of the "Dauntless" tried out. Before what tribunal can it be done? Certainly not in the action at law now pending in the State court for that court is alone concerned with the question of damages, determinable upon an actionable wrong having been committed by appellant through some officer or agent, of one or both of the tugs. The jury will not make a finding as to who, or which tug

committed a wrong, but would only concern itself with the question as to whether a wrong was done. Its determination of that question will find expression through an award or non-award of damages. It will not point out the wrongdoer! Where then is this right of fault and limitation to be determined? Nowhere, except in the District Court in the very character of proceedings instituted by petitioner.

In these circumstances, therefore, we respectfully submit that this honorable court has erred in affirming the decision of the District Court dismissing appellant's petition for limitation of liability.

We respectfully request that the court set aside the decision already given in the case, and afford us an opportunity of further discussing the questions therein involved.

Dated, San Francisco,

December 16, 1914.

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

IRA A. CAMPBELL,

Of Counsel for Appellant and Petitioner.

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRED STEBLER,

Appellant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION and GEORGE D. PARKER,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Southern District of California,
Southern Division.

FILED

APR 11 1914

No. 2394

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Appellant:

FREDERICK S. LYON, Esq., 504-7 Merchants
Trust Building, Los Angeles, California.

For Appellees:

NICHOLAS A. ACKER, Esq., Foxcroft Build-
ing, 68 Post Street, San Francisco, Califor-
nia. [3*]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA.—ss.

To Riverside Heights Orange Growers' Association
and George D. Parker, Greeting:

You are hereby cited and admonished to be and
appear at a United States Circuit Court of Appeals
for the Ninth Circuit, to be held at the city of San
Francisco, in the State of California, on the 4th day
of April, A. D. 1914, pursuant to an order allowing
an appeal, entered in the Clerk's office of the Dis-
trict Court of the United States, of the Ninth Judi-
cial Circuit, in and for the Southern District of Cali-
fornia, in that certain suit in equity, Circuit Court
No. 1562, wherein Fred Stebler is complainant and
appellant, and you are defendants and appellees, to
show cause, if any there be, why the order or decree
of said Court made and entered February 18th,
1914, against said appellant, in the said order allow-
ing appeal mentioned, should not be corrected and

*Page-number appearing at foot of page of original certified Record.

speedy justice should not be done to the parties in that behalf.

Witness the Honorable OLIN WELLBORN, United States District Judge for the Southern District of California, and one of the Judges of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this 6th day of March, A. D. 1914.

OLIN WELLBORN,
U. S. District Judge, for the Southern District of California. [4]

Due service and receipt of copy of the within citation is hereby admitted this 6th day of March, 1914.

N. A. ACKER,
Solicitor and of Counsel for Defendants.

[Endorsed]: A. No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler vs. Riverside Heights Orange Growers' Assn. Citation. Filed Mar. 7, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [5]

*In the District Court of the United States of America,
in and for the Southern District of California,
Southern Division.*

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION and GEORGE D. PARKER,
Defendants. [6]

*United States Circuit Court, Southern District of
California, Southern Division.*

IN EQUITY.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION, GEORGE D. PARKER and
PARKER MACHINE WORKS,

Defendants.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court
of the United States for the Ninth Circuit,
Southern District of California, Southern Division:

Fred Stebler, a citizen of the State of California and resident of Riverside, California, brings this his Bill of Complaint against Riverside Heights Orange Growers' Association, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Riverside, California, George D. Parker, a resident of Riverside, California, and Parker Machine Works, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Riverside, California, and thereupon, complaining, shows unto your Honors:

I.

That heretofore, to wit, prior to the 28th day of

April, 1902, one Robert Strain, of Fullerton, California, was the original, first and sole inventor of a certain new and useful Fruit Grader, not known or used by others before his invention or discovery thereof; or patented or described in any [7] prior publication in the United States of America or any foreign country before his invention or discovery thereof, or more than two years prior to his application for letters patent thereon in the United States of America, as hereinafter set forth, or in public use or on sale in the United States for more than two years prior to his said application for letters patent of the United States therefor, and not abandoned.

II.

That said Robert Strain so being the original, first and sole inventor of said Fruit Grader, to wit, on the 28th day of April, 1902, made application in writing, in due form of law, to the Commissioner of Patents of the United States of America, in accordance with the then existing laws of the United States of America in such case made and provided, and complied in all respects with the conditions and requirements of said law, and thereafter, and prior to the 9th day of June, 1903, by an instrument in writing, in due form of law, duly signed by said Robert Strain, and by him delivered to your orator, Fred Stebler, and Austin A. Gamble, of Riverside, California, the said Robert Strain did sell, assign, transfer and set over unto your said orator and the said Austin A. Gamble, the full and exclusive right, title and interest in and to the said invention and in and to the letters patent to be granted and issued

therefor, and did authorize and request the Commissioner of Patents to issue said letters patent jointly to your orator and the said Austin A. Gamble; that said instrument in writing, was, to wit, prior to June 9th, 1903, duly and regularly recorded in the United States Patent Office; that thereafter such proceedings were duly and regularly had and taken in the matter of such application that, to wit, on June 9th, 1903, letters patent of the United States of America, No. 730,412, were duly and regularly granted and issued and delivered by the Government of [8] the United States of America to your orator and the said Austin A. Gamble, whereby there was granted and secured to your orator and the said Austin A. Gamble, their heirs, legal representatives and assigns, for the full term of seventeen years (17), from and after said 9th day of June, 1903, the sole and exclusive right, liberty and privilege of making, using and vending to others to be used the said invention *throughout* the United States of America and the territories thereof; that the said letters patent were duly issued in due form of law under the seal of the United States Patent Office and duly signed by the Commissioner of Patents, all as will more fully appear from said original letters patent or a duly certified copy thereof which are ready in court to be produced by your orator, as may be required; and that prior to the grant, issuance and deliverance of the said letters patent all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions.

III.

And your orator further shows unto your Honors that on October 12th, 1903, the said Robert Strain and your orator and the said Austin A. Gamble discovered for the first time that the said letters patent were inoperative and insufficient and that the errors which rendered said letters patent No. 730,412 so inoperative and insufficient arose from the inadvertence, accident and mistake of the Commissioner of Patents of the United States and without any fraudulent intention on the part of the said Robert Strain or upon the part of your orator, or upon the part of said Austin A. Gamble; that said inadvertence, accident and mistake upon the part of the said Commissioner of Patents of the United States consisted in this, that after the said Robert Strain had duly filed in the United States Patent Office his application for letters patent upon the said Fruit Grader, as aforesaid, one Charles Rayburn did, on August 18th, 1902, file in the United States Patent Office an application [9] for letters patent upon said new and useful Fruit Grader and in said application did make certain claims as the original, true and first inventor thereof; that through the inadvertence, accident and mistake of the Commissioner of Patents a patent was issued to the said Charles Rayburn therefor, said letters patent being numbered 726,756, and were granted, issued and delivered to the said Charles Rayburn on April 28th, 1903, and while the said Robert Strain's application for letters patent was pending in the United States Patent Office, as aforesaid, and the Commissioner

of Patents did by inadvertence, accident and mistake fail and neglect to give notice to the said Robert Strain, or your orator, or said Austin A. Gamble, of said Charles Rayburn's application for letters patent upon said Fruit Grader, and did fail and neglect to declare an interference proceeding between said Robert Strain and Charles Rayburn or the applications of said Robert Strain and Charles Rayburn for letters patent upon said Fruit Grader, and did fail and neglect to determine whether the said Robert Strain or the said Charles Rayburn was the original, first and sole inventor of said Fruit Grader, and did fail and neglect to determine the question of priority of invention between said Robert Strain and said Charles Rayburn; that said Robert Strain and your orator and the said Austin A. Gamble first discovered this inadvertence, accident and mistake upon the part of the Commissioner of Patents on October 12th, 1903, and did forthwith and immediately direct their attorneys to prepare an application for a reissue patent upon said Robert Strain's said invention in Fruit Grader; that said Robert Strain did make due application in writing, in due form of law, for a reissue of said letters patent, which said application was filed in the United States Patent Office on October 21st, 1903, by the said Robert Strain with the full consent and allowance of your orator and the said Austin A. Gamble, and that thereafter due proceedings were had in the United States [10] Patent Office in accordance with the statutes in such cases made and provided, and in accordance with the rules of the United

States Patent Office, and that said Robert Strain was adjudged to be the original, first and sole inventor of said Fruit Grader and judgment of priority of invention was rendered and entered in the United States Patent Office in favor of Robert Strain and against said Charles Rayburn; and thereafter, to wit, on December 27th, 1904, the said Robert Strain and your orator and the said Austin A. Gamble having in all respects complied with the Acts of Congress in such case made and provided, and having surrendered the said original letters patent No. 730,412, said letters patent were cancelled and new or amended letters patent which were marked "Reissue No. 12,297" were on the 27th day of December, 1904, in due form of law, granted, issued, and delivered to your orator and the said Austin A. Gamble, which said reissue letters patent are of record in the Patent Office of the United States, as will more fully and at large appear from said original reissued letters patent or a duly certified copy thereof ready here in court to be produced, whereby there was granted and secured to your orator and the said Austin A. Gamble, their heirs, legal representatives and assigns, for the full term of seventeen years (17), from and after the 9th day of June, 1903, the sole and exclusive right, liberty and privilege of making, using and vending the said invention as described and claimed in said reissued letters patent throughout the United States of America and the territories thereof.

IV.

And your orator further shows unto your Honors

that the said invention so set forth, described and claimed in and by the said letters patent aforesaid is of great value and has been extensively practiced by your orator and by [11] your orator and the said Austin A. Gamble, and that since the grant, issuance and delivery of the said letters patent the said Fruit Grader has gone into great and extensive use, and your orator and said Austin A. Gamble have sold large numbers thereof, and the same has substantially displaced all other forms of devices for said purpose and become the standard Fruit Grader; and upon each and every one of said Fruit Graders manufactured, used or sold by your orator or by your orator and said Austin A. Gamble, as aforesaid, your orator, and your orator and the said Austin A. Gamble have marked in bold and conspicuous letters the word "Patented," together with the day and date of issuance of said letters patent, to wit, June 9th, 1903, and December 27th, 1904, thereby notifying the public of said letters patent, and the trade and public have generally respected and acquiesced in the validity and scope of said letters patent and of the exclusive rights of your orator, and of your orator and said Austin A. Gamble therein and thereunder, and save and except for the infringement thereof by defendants as hereinafter set forth your orator, and your orator's assignors, have had and enjoyed the exclusive right, liberty and privilege, since December 27th, 1904, of manufacturing, selling and using Fruit Graders embodying and containing the invention described in, set forth and claimed in said letters patent, and but for

the wrongful and infringing acts of defendants, as hereinafter set forth, your orator would now continue to enjoy the said exclusive rights and the same would be of great and incalculable benefit and advantage to your orator, and the said defendants have been, long prior to the commencement of this suit, notified in writing of the grant, issuance and delivery of the said letters patent and of the rights of your orator thereunder, and have had full [12] knowledge of your orator's said rights under said letters patent, and demand has been made upon defendants to respect the said letters patent and not to infringe thereon, but notwithstanding such notice the defendants have continued to make, use and sell Fruit Graders embodying the said invention, as hereinafter more particularly set forth.

V.

Your orator further shows unto your Honors that heretofore, to wit, prior to the first day of January, 1910, by an instrument in writing in due form of law, duly signed by the said Austin A. Gamble, and delivered by him to your orator, the said Austin A. Gamble did sell, assign, transfer and set over unto your orator, his heirs and assigns, all his right, title and interest in and to the said Fruit Grader invention and in and to the said letters patent aforesaid granted and issued therefor, and did thereby sell, assign, transfer and set over unto your orator, and vest in your orator, and your orator did become the sole and exclusive owner of the full and exclusive right, title and interest in and to the said Fruit Grader invention and in and to the said letters patent granted and is-

sued therefor, all as will more fully and at large appear from said original instrument in writing or a duly certified copy thereof ready in court to be produced as may be required.

VI.

And your orator further shows unto your Honors that notwithstanding the premises, but well knowing the same, and without the license or consent, of your orator, and in violation of said letters patent, and of your orator's rights thereunder, the said defendants herein have within the year last past and in the Southern District of California, to wit, [13] in the County of Riverside, State of California, and elsewhere, made, used and sold to others to be used, and are now making, using and selling to others to be used Fruit Graders embodying, containing and embracing the invention described and claimed and patented in and by said reissued letters patent, and have infringed upon the exclusive rights secured to your orator by virtue of said reissued letters patent, and that the Fruit Graders so made, used and sold by defendants were and are infringements upon said letters patent and each of said Fruit Graders contains in it the said patented invention, and that although requested so to do defendants refuse to cease and desist from the infringement aforesaid and are now making, using and selling Fruit Graders containing and embracing the said patented invention and threaten and intend to continue so to do, and will continue so to do unless restrained by this Court, and are realizing as your orator is informed and believes, large gains, profits and advantages, the exact amount of which is un-

known to your orator; that by reason of the premises and the unlawful acts of the defendants aforesaid, your orator has suffered and is suffering great and irreparable damage and injury; that for the wrongs and injuries herein complained of your orator has no plain, speedy or adequate remedy at law and is without remedy save in a court of equity where matters of this kind are properly cognizable and relievable.

To the end therefore that the said defendants, Riverside Heights Orange Growers' Association, George D. Parker and Parker Machine Works, may, if they can, show why your orator should not have the relief herein prayed, and may according to the best and utmost of their knowledge, recollection, information and belief, but not under oath (an answer under oath being hereby expressly waived), full, true, direct and perfect answer make to all and singular the matters and things [14] hereinbefore charged; your orator prays that the defendants may be enjoined and restrained, both provisionally and perpetually, from further infringement upon the said letters patent, and be decreed to account for and pay over unto your orator the gains and profits realized by defendants from and by reason of the infringement aforesaid, and may be decreed to account for and pay over unto your orator the damages suffered by your orator by reason of the said infringement, together with the costs of this suit, and for such other and further or different relief as equity and good conscience shall require.

May it please your Honors to grant unto your orator a writ of injunction issued out of and under

the seal of this Court, provisionally, and until the final hearing, enjoining and restraining said defendants, Riverside Heights Orange Growers' Association, George D. Parker and Parker Machine Works, their agents, attorneys, associates, servants and employees, and each and every thereof, from making, using and selling any Fruit Graders containing or embracing the invention patented in and by said letters patent, and that upon the final hearing of this case said provisional injunction may be made final and perpetual.

May it please your Honors to grant unto your orator a writ of subpoena of the United States issued out of and under the seal of this Court and directed to the said defendants, Riverside Heights Orange Growers' Association, George D. Parker, and Parker Machine Works, commanding them by a day certain and under a certain penalty fixed by law, to be and appear before this honorable Court, then and there to answer this bill of complaint and to stand to and perform and abide by such further orders and decrees as to your Honors may seem meet in the premises.

And your orator will ever pray.

FRED STEBLER.

FREDERICK S. LYON,

Solicitor and of Counsel for Complainant, 503-8 Merchants' Trust Company Building, Los Angeles, California. [15]

United States of America,
State of California,
County of Riverside,—ss.

Fred Stebler, being duly sworn, on oath, says; that

he is the complainant named in the foregoing bill of complaint, that he has read said bill of complaint and knows the contents thereof and that the same is true of his own knowledge.

FRED STEBLER.

Subscribed and sworn to before me this 23d day of May, 1910.

[Seal]

WM. STUDABECKER,
Notary Public in and for Riverside County, State of California.

[Endorsed]: No. 1562. United States Circuit Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association, George D. Parker and Parker Machine Works, Defendants. In Equity. Bill of Complaint. Filed May 24, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Frederick S. Lyon, 504-7 Merchants' Trust Building, Los Angeles, Cal., Solicitor for Complainant. [16]

*In the United States Circuit Court, Southern District
of California, Southern Division.*

IN EQUITY—No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION, GEORGE D. PARKER,
and PARKER MACHINE WORKS,
Defendants.

Answer.

The answer of the Riverside Heights Orange Growers' Association, George D. Parker, and Parker Machine Works, defendants, to the bill of complaint of Fred Stebler, complainant.

These defendants, now and at all times hereafter, saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said complainant's said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as these defendants are advised is, or are, material or necessary for them to make answer unto, these defendants for answering saith:

1. Admit that the Riverside Heights Orange Growers' Association, [17] one of the defendants herein, is a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Riverside, California, and admits that George D. Parker, another of the defendants herein, is a resident of Riverside, California.

2. Deny that the Parker Machine Works, one of the defendants herein, is a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in Riverside, California.

3. They deny that the said Robert Strain, mentioned in the Bill of Complaint, prior to the 28th day of April, 1902, or at any other time, or at all, was

either the original first and sole inventor of the alleged certain new and useful Fruit Grader, alleged in the bill of complaint to be more particularly described in the alleged letters patent alleged to have been issued therefor by the Government of the United States; and they deny that the said improvements, or any of them, were a new or useful invention, or were not known or used by others in this country before the alleged invention or discovery thereof by the said Robert Strain, and deny that the same were not patented or described in any prior publication in the United States of America or any foreign country before his invention or discovery thereof, or more than two years prior to his application for letters patent thereon in the United States of America, or that the same was not in public use or on sale in the United States for more than two years prior to his said application for letters patent of the United States therefor, or that the same was not abandoned.

4. These defendants, further answering, say that as to whether or not the said Robert Strain, being as aforesaid the alleged original and first inventor of the said alleged [18] improvement in Fruit Graders, or otherwise, did on the 28th day of April, 1902, or at any other time, duly or regularly make or file in the Patent Office of the United States, an application in writing, praying for the issuance to him of letters patent of the United States for the said alleged invention, these defendants are not informed save by the bill of complaint herein, and they, therefore, deny the same, all and singular, and leave com-

plainant to make such proof thereof as he may be advised is material.

5. These defendants, further answering, say that as to whether or not after the filing of the said alleged application in the United States Patent Office, and before the granting of letters patent thereon, or at any other time, the said Robert Strain, by an instrument in writing, in due form of law, or otherwise, duly signed by him, and by him delivered to Fred Stebler, complainant herein, and Austin A. Gamble, of Riverside, California, and duly recorded in the United States Patent Office, or otherwise, the said Robert Strain did sell, assign, transfer and set over unto the said Fred Stebler and the said Austin A. Gamble, the full and *excluse* right, title and interest in and to the said invention, or any right, title or interest in and to the same, and in and to the letters patent to be granted and issued therefor, with the request that the letters patent therefor, when granted, should be issued jointly to the said Fred Stebler and the said Austin A. Gamble, they are not informed save by the bill of complaint herein, and they, therefore, deny the same, all and singular, and leave complainant to make such proof thereof as he shall be advised is material. These defendants deny that thereafter, or at any time, such proceedings were duly and regularly taken in the matter of the said alleged application, that, on the 9th day of June, 1903, or at any other time, letters patent of the United States of America, No. 730,412, were duly [19] and regularly granted and issued and delivered by the Government of the United States of America to the said Fred Stebler

and the said Austin A. Gamble, or either of them, and deny that the said Fred Stebler and the said Austin A. Gamble, or either of them, or their heirs, legal representatives and assigns, or either of them, were granted for the full term of seventeen years (17) from and after the 9th day of June, 1903, or for any other term, the sole and exclusive right, liberty and privilege of making, using and vending to others to be used the said alleged invention throughout the United States of America and the territories thereof.

6. These defendants, further answering, deny that the said alleged letters patent were issued in due form of law, or otherwise, under the seal of the United States Patent Office, or otherwise, or were duly signed by the Commissioner of Patents; and deny that said facts will more fully appear from said alleged letters patent themselves.

7. These defendants, further answering, deny that prior to the issuance of said alleged letters patent, all proceedings were had or taken which were required to be had and taken prior to the issuance of letters patent for new and useful inventions.

8. These defendants, further answering, say that whether the said alleged letters patent No. 730,412, referred to in the bill of complaint as having been issued as therein stated, for an improved Fruit Grader, were inoperative and insufficient, and whether the error by reason of which the same were rendered inoperative and insufficient arose by inadvertence, accident and mistake on the part of the Commissioner of Patents of the United States and without any fraudulent intention on the part of the

said Robert Strain, or upon the part of Fred Stebler, complainant herein, or upon the part of the said Austin A. Gamble, they are not informed save by the bill of complaint herein, and they, therefore, deny the same, and leave complainant to make such proof thereof as he shall be advised is material. [20]

9. These defendants, further answering, say that whether the alleged inadvertence, accident and mistake upon the part of the Commissioner of Patents of the United States was occasioned by the fact that after the said Robert Strain had filed in the United States Patent Office his alleged application for letters patent upon said Fruit Grader, one Charles Rayburn, did on August 18th, 1902, file in the United States Patent Office an application for letters patent upon said new and useful Fruit Grader and in said application did make certain claims as the original, true and first inventor thereof, and that through the inadvertence, accident and mistake of the Commissioner of Patents a patent was issued to said Charles Rayburn therefor, said letters patent being numbered 726,756, which were granted, issued and delivered to the said Charles Rayburn on April 28th, 1903, and while the said Robert Strain's application for letters patent was pending in the United States Patent Office, and the Commissioner of Patents did by inadvertence, accident and mistake fail and neglect to give notice to the said Robert Strain, or to Fred Stebler, complainant herein, or to said Austin A. Gamble, of said Charles Rayburn's application for letters patent upon said Fruit Grader, and did fail and neglect to declare an interference proceeding between

said Robert Strain and Charles Rayburn or the applications of said Robert Strain and Charles Rayburn for letters patent upon said Fruit Grader, and did fail and neglect to determine whether the said Robert Strain or the said Charles Rayburn was the original, first and sole inventor of said Fruit Grader, and did fail and neglect to determine the question of priority of invention between said Robert Strain and Charles Rayburn, they are not informed save by the bill of complaint herein, and they, therefore, deny the same, all and singular, and leave complainant to make such proof thereof as he shall be advised is material. [21]

10. These defendants, further answering, say that whether the said Robert Strain, and Fred Stebler, complainant herein, and the said Austin A. Gamble first discovered the alleged inadvertence, accident and mistake upon the part of the Commissioner of Patents on October 12th, 1903, and did forthwith and immediately direct their attorneys to prepare an application for a reissue patent upon said Robert Strain's said invention in Fruit Graders, or whether the said Robert Strain did make due application in writing, in due form of law, or otherwise, for a reissue of the letters patent mentioned in the Bill of Complaint, or whether said alleged application was filed in the United States Patent Office on October 21st, 1903, by the said Robert Strain with the full consent and allowance of Fred Stebler, complainant herein, and the said Austin A. Gamble, or whether thereafter due proceedings were had in the United States Patent Office in accordance with the statute in such cases made and provided, and in accordance with the Rules

of the United States Patent Office, or whether the said Robert Strain was adjudged to be the original, first and sole inventor of said Fruit Grader and judgment of priority of invention was rendered and entered in the United States Patent Office in favor of said Robert Strain and against said Austin A Gamble, they are not informed save by the bill of complaint herein, and they, therefore, deny the same, all and singular, and leave complainant to make such proof thereof as he shall be advised is material.

11. These defendants, further answering, say that whether the said Robert Strain and Fred Stebler, complainant herein, and Austin A. Gamble having in all respects complied with the Acts of Congress in such cases made and provided, and having surrendered the said original letters patent No. 730,412, said letters patent were cancelled and new or amended letters patent [22] which were marked "Reissue No. 12,297" were on the 27th day of December, 1904, in due form of law, granted, issued and delivered to Fred Stebler, complainant herein, and the said Austin A. Gamble, which said reissue letters patent are of record in the Patent Office of the United States, they are not informed save by the bill of complaint herein, and they, therefore, deny the same, all and singular, and leave complainant to make such proof thereof as he shall be advised is material; and deny that said facts will more fully and at large appear from said original reissue letters patent or a duly certified copy thereof.

12. These defendants deny that the said reissue letters patent No. 12,297 were effective to grant and

secure to the said Fred Stebler, complainant herein, and the said Austin A. Gamble, their heirs, legal representatives and assigns, for the full term of seventeen years (17) or for any term, either from and after the 9th day of June, 1903, or from any other date, the sole and exclusive right, liberty and privilege of making, using and vending the said invention as described and claimed in said reissue letters patent throughout the United States of America and the territories thereof.

13. These defendants aver that they are not informed as to whether or not the invention alleged to be contained in the said reissue letters patent No. 12,297 is the same invention as that set forth in the original letters patent No. 730,412, set forth in the bill of complaint herein, and they, therefore, deny the same and leave the complainant to make such proof thereof as he shall be advised is material.

14. Further answering, these defendants deny that the alleged invention alleged to be protected by the said alleged reissue letters patent is of great or any value, and deny that [23] since the issuance of the said alleged reissue letters patent, or at any time, the Fruit Graders mentioned therein have gone into great and extensive use, or have been extensively practiced, or otherwise, and deny that large numbers thereof have been sold, and deny that upon each and every one of said Fruit Graders manufactured, used or sold by the complainant herein, or by the said complainant and Austin A. Gamble, or by either of them, made in accordance with the said reissue letters patent, has been marked with the word "Patented"

together with the date and number thereof, and deny that the public was thereby notified of the same, and deny that the trade and public have generally respected and acquiesced in the validity and scope of said letters patent and the *excluse* right, or any right of the complainant herein, and of the complainant and said Austin A. Gamble, and deny that save and except for the alleged infringement thereof by these defendants, the complainant herein and the complainant and the said Austin A. Gamble, would have had and enjoyed the exclusive right, liberty and privilege, since December 27th, 1904, or any other time, of manufacturing, selling and using Fruit Graders embodying and containing the invention described in, set forth and claimed in said letters patent, and deny that but for the alleged wrongful and infringing acts of these defendants, complainant herein would now continue to enjoy the said exclusive rights, or any rights, at all, and that the same would be of great and *incalculable* benefit and advantage, or any benefit and advantage, to the complainant, and deny that they have been, long prior to the commencement of this suit, notified in writing of the grant, issuance and delivery of the said letters patent and of the rights of the complainant thereunder, and deny that they have had full knowledge of complainant's said rights under said letters patent and that demand has been made upon them to respect the said letters patent and not [24] to infringe thereon, and deny that notwithstanding such alleged notice they have continued to make, use and sell Fruit Graders embodying the said alleged invention.

15. Defendants, further answering, say that whether prior to the first day of January, 1910, or at any other time, by an instrument in writing in due form of law, or otherwise, duly signed by the said Austin A. Gamble, and delivered by him to the complainant herein, the said Austin A. Gamble did sell, assign, and transfer and set over unto the complainant herein, his heirs, and assigns, all his right, title, and interest in and to the said Fruit Grader invention and in and to the said letters patent granted and issued therefor, and did thereby sell, assign and transfer and set over unto and did vest in the complainant herein, and complainant did become the sole and exclusive owner of the full and exclusive right, title and interest in and to the said alleged Fruit Grader invention and in and to the said alleged letters patent granted and issued therefor, they are not informed save by said bill of complaint herein, and they, therefore, deny the same, all and singular, and leave complainant to make such proof thereof as he may be advised is material, and they deny that said facts will more fully appear from said original instrument in writing or a duly certified copy thereof.

16. These defendants deny that since the issuance of said alleged letters patent, and within the year last past, or at any time, or within the Southern District of California, or at any other place, the defendants herein have made, used and sold to others to be used, and are now making, using and selling to others to be used Fruit Graders embodying, containing and embracing the invention described and claimed and patented in and by said reissue letters patent, and

deny that they [25] have infringed or are now infringing, or threaten to continue to infringe upon the alleged exclusive rights alleged to be secured to complainant by virtue of said alleged letters patent, and deny that any Fruit Grader made, used or sold, or sold to others for use, at any time, were or are an infringement upon said alleged letters patent, or contain or embody the said alleged invention.

17. Further answering, defendants deny that complainant has requested these defendants to cease or desist from their alleged infringement aforesaid, and deny that they are now making or selling or using Fruit Graders containing or embracing the alleged invention or any of them, alleged to be patented in and by said alleged letters patent, and deny that unless restrained by the order of this honorable Court they will at any time make or sell or use Fruit Graders alleged to be described and claimed in said alleged letters patent.

18. These defendants deny that by reason of the premises set up in said bill of complaint, or by reason of any unlawful act of the defendants, complainant has suffered any injury or damage, and deny that they have realized large gains, profits and advantages from and by reason of any alleged infringement of complainant's rights.

19. These defendants, further answering, aver that said alleged improvements or inventions described and claimed in the said original letters patent mentioned in the bill of complaint, and mentioned in the reissue letters patent thereof, did not and do not constitute any invention or discovery that was

or is patentable under the laws of the United States.

20. Defendants further answering, aver that in view of the prior state of the art pertaining to Fruit Graders and the manner of their construction and operation, there was and is no patentable invention contained and embraced in the said alleged improvements described and claimed in the said alleged [26] reissue letters patent sued on herein; but that the same or substantially the same things were well known in the art prior to the alleged invention thereof by the said Robert Strain; and, if in the alleged improvements there is anything new or different from what was known or discovered in said prior art, it was not the result of patentable invention, but wholly the result of the ordinary skill of the mechanic, and is of no practical utility.

And for a further and separate defense, these defendants aver that the alleged invention described and claimed in the said alleged reissue letters patent sued on herein, or substantially the same was, long prior to the supposed invention or discovery thereof by the said Robert Strain, indicated, described and patented in and by the following letters patent of the United States, to wit:

Number.	Date.	Names of Patentees.
No. 247,428,	Sept. 20, 1881,	H. B. Stevens.
“ 348,128,	Aug. 24, 1886,	J. W. Keeney.
“ 352,421,	Nov. 9, 1886,	J. S. McKenzie.
“ 399,509,	Mar. 12, 1889,	F. N. Ellithorpe.
“ 430,031,	June 10, 1890,	J. A. Jones.
“ 442,288,	Dec. 9, 1890,	J. A. Jones.
“ 456,092,	July 14, 1891,	H. H. Hutchins.

Number,	Date.	Names of Patentees.
“ 458,422,	Aug.25, 1891,	J. T. Ish.
“ 465,856,	Dec. 29, 1891,	H. H. Hutchins.
“ 466,817,	Jan. 12, 1892,	E. E. Woodward.
“ 475,497,	May 24, 1892,	G. A. & C. F. Fleming.
“ 482,294,	Sept. 6, 1892,	A. C. Burke.
“ 529,032,	Nov. 13, 1894,	H. C. Jones.
“ 534,783,	Feb. 26, 1895,	A. Cerruti.
“ 538,330,	Apr. 30, 1895,	A. D. Huntley.
“ 654,281,	July 24, 1900,	M. P. Richards.
“ 671,646,	Apr. 9, 1901,	R. G. Bailey.
“ 673,127,	Apr. 30, 1901,	E. N. Maull.
“ 713,484,	Nov. 11, 1902,	C. D. Nelson.
“ 726,756,	Apr. 28, 1903,	C. Rayburn. [27]

21. Further answering, defendants aver that said Robert Strain was not the original or first or any inventor or discoverer of the alleged improvements and inventions, or any of them, alleged to be described in said alleged letters patent in suit, or of any material or substantial part of the same, but that, on the contrary, prior to the alleged invention thereof by the said Robert Strain, Charles Rayburn, who resides at Visalia, in the County of Tulare, State of California, had conceived and invented each and all of said alleged improvements and inventions, and said Charles Rayburn is the original and first inventor and discover of said alleged improvements and inventions, and of each and all of them.

22. And for a further and separate defense, these defendants aver that the said Robert Strain was not the original and first inventor or discoverer of the improvements or inventions alleged to be described

and covered by the said alleged reissue letters patent, nor of any material or substantial parts thereof, but that the same or all material or substantial parts thereof were, prior to the alleged invention thereof by the said Robert Strain, and more than two years prior to his said alleged application for letters patent thereon, manufactured and sold in this country, and these defendants specify such manufacture and sale as follows, to wit:

Manufactured and sold by G. G. Wickson, of the City and County of San Francisco, State of California.

23. And for a further and separate defence, these defendants aver that the said alleged improvements and inventions, and each and all of them, had been, prior to the alleged invention thereof by the said Robert Strain, and more than two years prior to his alleged application for letters patent thereon, known to and used by the following named persons, firms, and corporations, at the following places, to wit:
[28]

Uplands Citrus Association, in its plant at Upland, California; also by the W. H. Jameson Packing House, in its plant at Corona, California; The Arlington Heights Fruit Company, in its plant at Arlington, California; Victoria Avenue Citrus Association, in its plant at Casa Blanca, California; San Jacinto Packing House Company, in its plant at Arlington, California; Placentia Orange Growers' Association, in its plant at Fullerton, California; Santiago Orange Growers' Association, in its plant at Orange, California; Indian Hill Citrus Associa-

tion, in its plant at North Pomona, California; Worthley & Strong, in their plant at Riverside, California; and was known to Charles S. Adams, whose residence is Upland, California; W. H. Jameson, whose residence is Corona, California; Charles Spencer, Edward Gilman, and Ernest Parker, each of Orange, California, and was known to and used by others whose names and places of residences, and the places of such use are at this time unknown to these defendants, but which these defendants crave leave to insert herein and make a part hereof when they shall be discovered.

24. Further answering, these defendants aver that the public at no time has acquiesced in the validity of the said alleged letters patent in suit, and that the validity of said letters patent has not been adjudicated or established in an action at law; that, therefore, this Court, sitting as a court in equity, has no jurisdiction of this case, and complainant's relief in the premises, if to any relief he is entitled, can only be obtained in an action at law.

And, therefore, these defendants submit and insist that under the facts and circumstances as above alleged, the said complainant is not entitled to the relief, or any part thereof, in the said bill of complaint demanded, nor has said complainant any right to any further answer to said bill nor any part thereof than is above given. [29]

And these defendants pray the same advantage of their aforesaid answer as if they had pleaded or demurred to the said bill of complaint, and they pray leave to be dismissed with their reasonable costs and

charges in this behalf most wrongfully sustained.

RIVERSIDE HEIGHTS ORANGE GROW-
ERS' ASSOCIATION,

PARKER MACHINE WORKS,

GEORGE D. PARKER,

By N. A. ACKER,

WM. F. BOOTH,

Solicitors and Attorneys for Defendants.

N. A. ACKER,

WM. F. BOOTH,

Solicitors and of Counsel for Defendants.

[Endorsed]: No. 1562. In the United States Circuit Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association, George D. Parker, and Parker Machine Works, Defendants. Answer. Filed Jul. 26, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. N. A. Acker, Wm. F. Booth, #68 Post St., San Francisco, Cal., Solicitors and Counsel for Defendants. [30]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION, and GEORGE D. PARKER.

Defendants.

Interlocutory Decree.

Pursuant to the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, it is hereby ORDERED, ADJUDGED AND DECREED:

First: That the decree herein signed, filed and entered on September 17, 1912, dismissing complainant's bill of complaint, be and the same is hereby vacated, set aside, canceled and rescinded and judgment in favor of defendants and against complainant for the sum of \$383.40 is vacated, set aside, canceled and rescinded.

Second: That Robert Strain was the original, first and sole inventor of the Fruit Grader set forth, described and claimed in reissued letters patent of the United States No. 12,297, and particularly as set forth in claims one (1) and ten (10) thereof, which are as follows:

Claim 1: "In a Fruit-Grader, in combination a plurality of independent transversely-adjustable rotating rollers; a non-movable grooved guide lying parallel with the plane which passes vertically and longitudinally through the center of said rollers, said rollers and guide forming a fruit-runway; a rope in the groove in said guide and means to move said rope."

Claim 10: "In a fruit-grading machine, a runway formed of two parallel members, one of said members consisting of a series of end-to-end rolls, brackets carrying the rolls, guides for the brackets, and means for adjusting the brackets upon the guides, substantially as set forth." [31]

That the same had not been known or used by others before said Robert Strain's invention or discovery thereof or patented or described in any printed publication in the United States of America or any foreign country before said Robert Strain's invention or discovery thereof or more than two years prior to said Robert Strain's original application for letters patent thereon, or in public use or on sale in the United States of America for more than two years prior to said Robert Strain's said application for letters patent thereon, and not abandoned; that said Robert Strain made application in writing in due form of law to the Commissioner of Patents of the United States in accordance with the laws of the United States of America in such case made and provided for letters patent thereon and complied in all respects with the conditions and requirements of such law, and thereafter by an instrument in writing signed by him duly sold, assigned and transferred to complainant Fred Stebler and one Austin A. Gamble the full and exclusive right, title and interest in and to said invention and in and to the letters patent to be granted and issued therefor; that letters patent of the United States No. 730,412 were on June 9, 1903, granted, issued and delivered by the Government of the United States to said Fred Stebler and Austin A. Gamble, whereby there was granted and secured to them, their heirs, legal representatives and assigns for the full term of seventeen years from and after the 9th day of June, 1903, the sole and exclusive right, liberty and privilege of making, using and vending to others to be used the said invention

throughout the United States of America and the territories thereof; that said letters patent were issued in due form of law under the seal of the United States Patent Office and duly signed by the Commissioner of Patents; that the said letters patent No. 730,412 were inoperative and insufficient [32] by reasons of certain errors and insufficiencies and that the said errors which rendered said letters patent so inoperative and inefficient arose from the inadvertence, accident and mistake of the Commissioner of Patents of the United States and without any fraudulent intention on the part of said Robert Strain or Fred Stebler or Austin A. Gamble; that promptly and diligently upon the discovery of such errors by said Robert Strain, Fred Stebler and Austin A. Gamble, said Robert Strain, with the consent and allowance of said Fred Stebler and Austin A. Gamble made application for reissued or amended letters patent for said invention, and after due proceedings had in the United States Patent Office in due accord with the law in such case made and provided on December 27, 1904, reissued or amended letters patent No. 12,297 were on the 27th day of December, 1904, in due form of law granted, issued and delivered to the said Fred Stebler and Austin A. Gamble, whereby there was granted and secured to the said Fred Stebler and Austin A. Gamble, their heirs, legal representatives and assigns, for the full term of seventeen years from and after the 9th day of June, 1903, the sole and exclusive right, liberty and privilege of making, using and vending to others to be used the said invention throughout the

United States of America and the territories thereof, as described and claimed in said reissued letters patent.

Third: That said reissued letters patent number 12,297 are good and valid in law, and that said claims one (1) and ten (10) thereof are good and valid in law.

Fourth: That by an instrument in writing, executed by him and delivered to complainant, said Austin A. Gamble sold, assigned and transferred to complainant all said Austin A. Gamble's right, title and interest in, to and under said letters patent and invention and complainant Fred Stebler became and at the commencement of this suit was and now is the [33] sole owner of the full and exclusive right, title and interest in, to and under said letters patent and invention together with all rights of action, claims or demands of whatsoever nature arising out of or accruing from past infringement thereof.

Fifth: That said Fred Stebler and Austin A. Gamble, while owning said letters patent jointly, and said Fred Stebler, since said assignment to him by said Austin A. Gamble, have manufactured and sold numbers of Fruit Graders or Sizers embodying said invention, and that upon each and every thereof have distinctly and plainly marked in bold and conspicuous letters the word "Patented," together with the words and figures "June 9, 1903 and December 27, 1904"; that prior to the commencement of this suit defendants Riverside Heights Orange Growers' Association and George D. Parker were each notified in writing by complainant of the said reissued letters

patent number 12,297 and of complainant's ownership thereof and that the Fruit Graders or Sizers said defendants were making and using were infringements thereof and were requested to respect said letters patent and discontinue the making, use or sale of such infringing machines.

Sixth: That the defendants Riverside Heights Orange Growers' Association and George D. Parker have infringed the said reissued letters patent number 12,297 and particularly the said first and tenth claims thereof and the exclusive rights of complainant thereunder by making, using and selling the so-called "Parker" grader and by making, using and selling graders, built in substantial accordance with letters patent of the United States number 997,468 granted to defendant Parker, without the license or consent of complainant, and have continued so to do since the commencement of this suit and threaten and intend to continue so to do. [34]

Seventh: That complainant recover of the defendants, and each of them, the profits, gains and advantages which said defendants, and each of them, have or has derived, received or made, by reason of said infringement, and that complainant recover of the said defendants, and each of them, any and all damages which complainant has sustained or shall sustain by reason of said infringement by defendants, or either of them.

Eighth: And it is hereby referred to Lynn Helm, Esq., as the Master of this court, who is appointed, *pro hac vice*, to take and state the account of said gains, profits and advantages and to assess such dam-

ages and to report thereon with all convenient speed, and the said Riverside Heights Orange Growers' Association and George D. Parker, their attorneys, officers, clerks, servants, agents, associates and workmen, are hereby directed and required to attend before said Master from time to time as he may require, and to produce before him such books, papers, vouchers, documents, records or other things and to submit to such oral examination as the Master may require.

Ninth: That a perpetual injunction issue out of and under the seal of this Court, directed to said defendants, Riverside Heights Orange Growers' Association and George D. Parker, their and each of their, officers, attorneys, agents, servants, workmen, clerks and associates enjoining and restraining them and each of them from directly or indirectly making or causing to be made, using or causing to be used, selling or causing to be sold, in any manner, any machine or device or Fruit Grader or Sizer, containing or embodying or employing the said invention granted by the said reissue letters patent, or particularly as set forth and claimed in claims numbered one (1) and ten (10) [35] thereof, or any device or machine capable of being combined or adapted to be used in infringement of said letters patent or said claims thereof or either thereof in any manner whatsoever; and from making or causing to be made, using or causing to be used or selling or otherwise disposing of for use any machine made in substantial accordance with letters patent of the United States number 997,468 granted to defendant George D. Parker, and from continuing the manufacture, sale or use in any

manner whatsoever of the so-called "Parker" grader or graders.

Tenth: That complainant do have and recover judgment against defendants Riverside Heights Orange Growers' Association and George D. Parker, jointly and severally, for the sum of \$1,576.63 costs and disbursements of this suit, and that the further questions of increase of damages be reserved until the coming in of the Master's Report.

Dated Los Angeles, California, Nov. 7th, 1913.

OLIN WELLBORN,

District Judge.

Decree entered and recorded November 7th, 1913.

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

\$382.60 being all of the items on the first page of items and \$2.00 on the second page of items in cost bill omitted by mistake on original taxation of costs and now inserted and included in the taxed costs, making the total costs taxed \$1959.23 Dec. 16, 1913.

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk. [36]

[Endorsed]: Cir. Ct. No. 1562. United States District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association, and George D. Parker, Defendants. In Equity. Interlocutory Decree. Filed Nov. 7, 1913. Wm. M. Van

Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
Frederick S. Lyon, 504-7 Merchants' Trust Building,
Los Angeles, Cal., Solicitor for Complainant. [37]

*In the District Court of the United States, Southern
District of California, Southern Division.*

IN EQUITY—No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROW-
ERS' ASSOCIATION, and GEORGE D.
PARKER,

Defendants.

**Defendants' Petition to Enjoin Prosecution of Suits
for Infringement.**

To the Honorable, The Judges of the Above-entitled
Court:

Come now the above-named defendants and give
this honorable Court to understand and be informed:

I.

That the above-entitled suit is for the infringement
of reissue letters patent of the United States No.
12,297, particularly claims 1 and 10 thereof, by de-
fendant Parker as manufacturer and seller and the
defendant Riverside Heights Orange Growers' Asso-
ciation as user of a certain Fruit Grader Machine,
manufactured and sold to it by the said defendant
Parker.

II.

That after full trial and hearing of said suit this Court signed, filed, and entered on Sept. 17, 1912, a decree dismissing the complainant's bill of complaint.

III.

That thereafter the complainant duly appealed from said decree of dismissal to the United States Circuit Court of Appeals for the Ninth Circuit, and said appeal was docketed as [38] No. 2232.

IV.

That said Appeal case No. 2232 came on for hearing at the October Term 1912 of said Court of Appeals, and thereafter in due course said Court made and entered its decree reversing the decree of dismissal of this Court of Sept. 17, 1912.

V.

That thereafter the said United States Circuit Court of Appeals for the Ninth Circuit, upon motion of defendants stayed its mandate for a time sufficient to enable said defendants to present a petition to the Supreme Court of the United States for a writ of certiorari.

VI.

That said defendants duly presented their said petition for a writ of certiorari to the Supreme Court of the United States.

VII.

That said petition was by said Supreme Court of the United States denied.

VIII.

That upon said denial of said petition as above mentioned in paragraph VII, the complainant herein

caused the mandate of the United States Circuit Court of Appeals to be issued.

IX.

That said complainant duly presented said mandate to this Court and the same was by this Court duly received and spread upon its minutes.

X.

That pursuant to said mandate this Court, on or about Nov. 5, 1913, made and entered its interlocutory decree, vacating [39] its previous decree of dismissal of Sept. 17, 1912, holding title to the patent sued on to be vested in complainant, holding the patent sued on valid, finding infringement of claims 1 and 10 thereof by the defendants herein; holding complainant to be entitled to recover from said defendants and each of them the profits, gains and advantages derived from said infringement, referring the accounting thereof to a Master, and granting a perpetual injunction against said defendants.

XI.

That said interlocutory decree last mentioned is now in full force and effect, but that no steps have, up to the present, been taken by said complainant in the matter of said accounting nor has the Master made any report thereof.

XII.

That subsequent to the rendition of the decree of the United States Circuit Court of Appeals for the Ninth Circuit and before the said interlocutory decree of this Court, complainant brought in this Court a large number of suits in equity upon the said reissue letters patent, against various other defendants as

infringing users of the said machines manufactured and sold by the defendant Parker herein, said suits being as follows to wit:

Fred Stebler vs. Pomona Fruit Growers' Exchange, No. A-44.

Fred Stebler vs. Whittier Citrus Association, No. A-45.

Fred Stebler vs. Indian Hill Citrus Association, No. A-49.

Fred Stebler vs. El Camino Citrus Association, No. A-50.

Fred Stebler vs. Colton Fruit Exchange, No. A-52.

Fred Stebler vs. Sierra Madre La Monda Citrus Association No. A-53.

Fred Stebler vs. Claremont Citrus Association No. A-54.

Fred Stebler vs. La Verne Orange Growers' Association, No. A-55. [40]

Fred Stebler vs. Lyman V. W. Brown, No. A-56.

Fred Stebler vs. Placentia Orange Growers' Association, No. A-70.

Fred Stebler vs. San Dimas Orange Growers' Association, No. A-71.

Fred Stebler vs. I. L. Lyon & Sons, No. A-73.

Fred Stebler vs. Elephant Orchards, No. A-74.

Fred Stebler vs. El Cajon Citrus Association, No. A-77.

Fred Stebler vs. Orange Heights Fruit Association, No. A-78.

Fred Stebler vs. Fernando Fruit Growers' Association, No. A-86.

Fred Stebler vs. Antelope Heights Orange Com-

pany, No. A-8, in the Northern Division of this court.

Fred Stebler vs. Redlands Heights Orange Growers' Association No. —.

Fred Stebler vs. Charles C. Chapman, No. A-64.

Fred Stebler vs. Covina Orange Growers' Exchange, No. A-66.

Fred Stebler vs. Walnut Fruit Growers' Association, No. A-57.

Fred Stebler vs. Pattee & Lett Company, No. A-51.

Fred Stebler vs. The West Ontario Citrus Association, No. A-65.

Fred Stebler vs. Anaheim Orange Growers' Association, No. A-43.

Fred Stebler vs. Edmund Peycke Company, No. A-67.

Fred Stebler vs. La Habra Citrus Association, No. A-62,

and has also brought another suit upon said patent against this defendant George D. Parker, entitled Fred Stebler vs. George D. Parker, No. A-90.

XIII.

That all of said defendants in the said suits mentioned in paragraph XII (exclusive of George D. Parker in the suit last named) are customers of the said George D. Parker, one of the petitioners herein, and that the acts of infringement complained of in said suits, are the use by said defendants of Fruit Grading Machines manufactured by the said George D. Parker and sold by him to said defendants, and are the same kind of machines held in this suit to be infringements, and are subject to the accounting against

the said Parker, still to be had in the present suit.
[41]

XIV.

That the said complainant Fred Stebler has threatened and still threatens and continues to threaten to bring many other similar suits against the customers of the said Parker, and that unless restrained by this Court will bring such suits, and will prosecute the same and will continue to prosecute the suits heretofore brought against said customers.

XV.

That your petitioner, the said George D. Parker, is financially able to respond to any judgment which may be rendered against him on the accounting in this case, and that whereas all of the machines complained of in the suits against his customers as aforesaid are machines made and sold by him, the said Parker, they are each and all subject to said accounting and must be accounted for by him in this case.

XVI.

That your petitioner Parker shows unto your Honors that complainant Stebler is a manufacturer and seller of the patented machines, and is not a user of the same, but that he derives his profit from his said patent solely by the manufacture and by the unconditional sale direct to the users of the said machines, and that upon the satisfaction by said Parker of any judgment of this Court which may be rendered upon the accounting herein, the infringing machines manufactured and sold by him, the said Parker, to his customers aforesaid, will be released from the patent monopoly, and the said defendants in the vari-

ous suits above named will not be liable to the said Stebler.

XVII.

That if the said Stebler be not restrained by this Court from continuing the prosecution of the said suits above named, and from bringing other suits of like nature against the customers [42] of said Parker, irreparable injury and damage will result to your said petitioner Parker, by the loss to him of his customers, who, on account of the harassment, annoyance, and expense occasioned by the acts of the said Stebler, will fall away from him in his general business and will cease to patronize him in the purchase of any and all packing-house machinery of every kind and nature and outside of and wholly foreign to the Grading Machines in question herein, for your petitioner Parker now shows to your Honors that he is a manufacturer and seller of general packing-house machinery and that he manufactures and sells many machines and apparatus in this line which have nothing to do with the Fruit Graders held to be infringements herein.

XVIII.

That your petitioner, Parker, shows to your Honors that the purpose of the said Stebler in the acts and course he is pursuing and threatens to pursue is to harass and annoy your petitioner's customers and to put them to needless expense and thereby to destroy and break up your petitioner's business, which will result to his irreparable injury and damage.

Inasmuch, therefore, as your petitioners are without any remedy, except in a court of equity, your peti-

tioners pray for an order enjoining the said Fred Stebler from further prosecuting the said suits above named, and from bringing any more suits of like nature against the customers of said Parker for the infringement of the said patent by the use of Fruit Grading Machines made and sold to them by said Parker, said injunction order to be continued until the rendition of the judgment of this Court upon the Master's report on the accounting in the present entitled cause, and your petitioners further pray that your Honors issue a [43] restraining order against said Stebler in the aforesaid matters until this petition is, upon proper motion herewith accompanying, heard and determined by your Honors.

And your petitioners will every pray.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSN.

GEORGE D. PARKER.

By N. A. ACKER,

Solicitor & Counsel for Defendants.

United States of America,
State of California,
County of Riverside,—ss.

George D. Parker, being duly sworn, on oath says; that he is the George D. Parker named in the foregoing petition to enjoin prosecution of suits for infringement; that he has read the said petition and knows the contents thereof, and that the same is true of his own knowledge.

GEORGE D. PARKER.

Subscribed and sworn to before me this 21st day of November, 1913.

[Seal]

LOTTIE E. WOOD.

[Endorsed]: No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association, and George D. Parker, Defendants. Defendants' Petition to Enjoin Prosecution of Suits for Infringement. Filed Nov. 25, 1913. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendants. [44]

[Affidavit of George D. Parker.]

In the District Court of the United States, Southern District of California, Southern Division.

IN EQUITY—No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION and GEO. D. PARKER,
Defendants.

State of California,
County of Riverside,—ss.

George D. Parker, of Riverside, in the County of Riverside, State of California, being first duly sworn, deposes and says:

That he is one of the defendants in the foregoing suit.

That since the rendition of the decision by the Circuit Court of Appeals for the Ninth Circuit the complainant herein has brought a large number of suits against users of the apparatus decreed to be an infringement of reissue letters patent No. 12,297. The said suits referred to being as follows:

Fred Stebler vs. Pomona Fruit Growers' Exchange, No. A 44, Equity.

Fred Stebler vs. Whittier Citrus Association, No. A 45, Equity.

Fred Stebler vs. Indian Hill Citrus Association, No. A 49, Equity.

Fred Stebler vs. El Camino Citrus Association, No. A 50, Equity.

Fred Stebler vs. Colton Fruit Exchange, No. A 52, Equity. [45]

Fred Stebler vs. Sierra Madre La Monda Citrus Association, No. A 53, Equity.

Fred Stebler vs. Claremont Citrus Association, No. A 54, Equity.

Fred Stebler vs. La Verne Orange Growers' Association, No. A 55, Equity.

Fred Stebler vs. Lyman V. W. Brown, No. A 56, Equity.

Fred Stebler vs. Placentia Orange Growers' Association, A 70.

Fred Stebler vs. San Dimas Orange Growers' Association, A 71.

Fred Stebler vs. I. L. Lyon & Sons, A 73.

Fred Stebler vs. Elephant Orchards, A 74.

Fred Stebler vs. El Cajon Citrus Association, A 77.

Fred Stebler vs. Orange Heights Fruit Association, No. A 78.

Fred Stebler vs. Fernando Fruit Growers' Association, A 86.

Fred Stebler vs. George D. Parker, A 90.

Fred Stebler vs. Antelope Heights Orange Company, A 8. (Northern Division.)

That affiant is the manufacturer and seller of each of the machines involved in the respective suits brought against the users thereof. That he is a manufacturer of packing-house machinery, having a place of business in Riverside, County of Riverside, State of California, the Fruit Graders being one of the articles manufactured by him for the packing-houses.

That he is financially responsible and able to respond in damages to the complainant herein for all Fruit Grading Machines sold by him to the users, and which Fruit Grading Machine has been adjudged to be an infringement of the said reissue patent No. 12,297.

That all of the profits connected with the manufacture and sale of the said infringing Fruit Graders has been derived by him as the manufacturer thereof, the Fruit Graders not being sold [46] to dealers for sale to the users thereof.

That the complainant herein is a manufacturer of packing-house machinery, and has an established place of business at Riverside, County of Riverside,

State of California, and nearby to the place of business of affiant.

That the complainant derives his profit on the patented Fruit Grader by the direct sale thereof as manufacturer to the users, no dealer being employed to whom the goods are sold for sale to the user.

That in the Equity Suit No. 1562 a decree has been entered and the matter referred to a Master for accounting, and on said accounting affiant herein, as manufacturer of the machines placed into use, is accountable to the complainant for each and every of said machines.

That he is willing and able to respond unto the complainant in such an amount as the Master may find to be due unto the complainant in connection with each of the infringing devices.

That to permit the suits against the users to be continued and prosecuted at this time will create an exceedingly heavy expense to the various defendants and unto affiant, which expense is a needless one at this time, inasmuch as the entire matter can be settled and adjusted before the Master on an accounting in the present suit; and such an accounting will dispose of the entire matter and give unto the complainant all that he is justly entitled to for each and every of the infringing devices manufactured and sold by this affiant.

That all of the machines referred to in the various equity suits before mentioned are machines manufactured and sold by this affiant.

That complainant receives no revenue from the patented devices by way of royalties or by the grant-

ing of licenses for the use of the machine. The entire profit made by the complainant [47] being, as before stated, derived by the manufacture and outright sale of the patented graders to the users direct.

That in the testimony relative to the foregoing suit affiant stated the approximate number of machines which he had manufactured and sold, and those machines therein referred to are all the machines complained of in the mentioned suits brought against the various users.

GEORGE D. PARKER.

Subscribed and sworn to before me this 15th day of November, 1913.

[Seal]

MARGARET CONDON,

Notary Public in and for the County of Riverside,
State of California.

[Endorsed]: Original. C. C. 1562. In the District Court of the United States, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association and Geo. D. Parker, Defendants. No. 1562. In Equity. Affidavit of Geo. D. Parker. Filed Nov. 25, 1913. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. N. A. Acker, Esq., Attorney for Defendants. [48]

**[Order Allowing Motion for Order Enjoining
Complainant from Prosecuting Certain Suits,
etc.]**

At a stated term, to wit: the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Wednesday, the eighteenth day of February, in the year of our Lord one thousand nine hundred and fourteen—Present: The Honorable OLIN WELLBORN, District Judge.

C. C. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION et al.,

Defendants.

Frederick S. Lyon, Esq., appearing as counsel for complainant; N. A. Acker, Esq., appearing as counsel for defendants; and this cause coming on at this time for the Court's decision on defendants' motion, heretofore submitted to the Court for its consideration and decision, for an order enjoining complainant from prosecuting further certain infringement suits already begun by him against the users of the Fruit Grading Machines made by George D. Parker, and from bringing any more suits of similar

nature against the users of said machines until the judgment of the Court is rendered on the Master's report on the accounting in this cause; and the conclusions of the Court on said motion having been filed in open court, now, by consent of counsel, the following order, in accordance with the ruling of said conclusions of the Court, a draft of which order has been made by counsel and submitted to the Court, is made and entered in this cause, to wit:

AND NOW, TO WIT, FEBRUARY 18th, 1914, upon due consideration thereof, it is hereby ordered, adjudged, and decreed that defendants' motion that complainant be enjoined and restrained [49] from any further prosecution of those certain suits hereinafter set forth by name of party and number, and from bringing any other suit or suits against users of machines manufactured in substantial accordance with letters patent of the United States, No. 997,468, be and the same is hereby allowed upon the defendants therein within five days from and after the date hereof, making, executing, and filing in this court a good and sufficient bond, with the usual sureties thereon, to be approved by the Clerk of this Court, in the sum of Ten Thousand (\$10,000.00) Dollars, conditioned that the said defendants and each of them, will pay to complainant any and all judgment or judgments rendered in favor of complainant and against them, or either of them, jointly or severally, in suit Circuit Court No. 1562, which said bond shall stipulate that any such judgment or judgments in said suit shall and may be at the time of the entry thereof against said defendants, dock-

eted and entered against such surety or sureties; and it is ordered that if such bond be not filed and approved within the said time, then and in that event defendants' said motion shall stand denied.

IT IS FURTHER ORDERED that nothing contained herein shall deprive the complainant of any right of appeal which he may have from the granting of the defendants' said motion in this case, or from the order or orders in any or all of said cases, suspending complainant's motion for temporary injunction therein, to the Circuit Court of Appeals for the Ninth Circuit.

The said cases or suits referred to are pending in this court on behalf of said complainant, the numbers of such suits, and defendants therein being as follows:

Anaheim Orange Growers' Association, No. A-43.

Pomona Fruit Growers' Exchange, No. A-44.

Whittier Citrus Association, No. A-45.

Indian Hill Citrus Association, No. A-49.

El Camino Citrus Association, No. A-50. [50]

Pattee & Lett Fruit Company, No. A-51.

Colton Fruit Exchange, No. A-52.

Sierra Madre & Lamanda Citrus Association, No. A-53.

Claremont Citrus Association, No. A-54.

La Verne Orange Growers' Association, No. A-55.

Lyman V. W. Brown, No. A-56.

Walnut Fruit Growers' Association, No. A-47.

Redlands Heights Orange Growers' Association, No. A-58.

Placentia Orange Growers' Association, No. A-70.

San Dimas Orange Growers' Association, No. A-71.
I. L. Lyon & Sons, No. A-73.
Elephant Orchards, No. A-74.
El Cajon Citrus Association, No. A-77.
Orange Heights Fruit Association, No. A-78.
Fernando Fruit Growers' Association, No. A-86.
Antelope Heights Orange Company, No. A-8 in
the Northern Division of this Court.
Charles C. Chapman, No. A-64.
Covina Orange Growers' Exchange, No. A-66.
West Ontario Citrus Association, No. A-65.
Edmund Peycke Company, No. A-67.
La Habra Citrus Association, No. A-62.
George D. Parker, No. A-90.
Denman Fruit Company, No. A-75.
El Ranchito Citrus Association, Cir. Ct. No. 1675.
Fay Fruit Company, No. A-63.
Redlands Heights Orchards, Ltd., No. A-76. [51]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION and GEORGE D. PARKER,
Defendants.

**Bond for Judgment Based on Order Restraining
Prosecution of Suits.**

KNOW ALL MEN BY THESE PRESENTS, that we, Riverside Heights Orange Growers' Association and George D. Parker, as principals and the United States Fidelity & Guaranty Company, a corporation,

A Corporation of Baltimore, Maryland.

organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto Fred Stebler in the full and just sum of Ten Thousand (\$10,000) Dollars, United States gold coin, to be paid to the said Fred Stebler, his certain attorney, executor, administrators or assigns; to which payment, well or truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of February, in the year of our Lord one thousand nine hundred and fourteen. [52]

WHEREAS, lately in the United States District Court, Southern District of California, Southern Division, in a suit depending in said court entitled Fred Stebler vs. Riverside Heights Orange Growers' Association and George D. Parker, Cir. Ct. No. 1562, and the said Riverside Heights Orange Growers' Association and George D. Parker on the 18th day of February, 1914, having obtained from this Court an order in the following words and figures, to wit:

*“United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS’
ASSOCIATION and GEORGE D. PARKER,
Defendants.

AND NOW, TO WIT, FEBRUARY 18th, 1914,
upon due consideration thereof, it is hereby ordered,
adjudged, and decreed that defendants’ motion that
complainant be enjoined and restrained from any
further prosecution of those certain suits hereinafter
set forth by name of party and number, and from
bringing any other suit or suits against users of ma-
chines manufactured in substantial accordance with
letters patent of the United States, No. 997,468, be
and the same is hereby allowed upon the defendants
therein within five days from and after the date
hereof, making, executing, and filing in this court a
good and sufficient bond, with the usual sureties
thereon, to be approved by the Clerk of this court,
in the sum of Ten Thousand (\$10,000) Dollars, condi-
tioned that the said defendants and each of them, will
pay to complainant any and all judgment or judg-
ments rendered in favor of complainant and against
them, or either of them, jointly or severally, in suit
Circuit Court No. 1562, which said bond shall stipu-
late that any such judgment or judgments in said suit

shall and may be at the time of the entry thereof against said defendants, docketed and entered against such surety or sureties; and it is ordered that if such bond be not filed and approved within the time, then and in that event defendants' said motion shall stand denied. [53]

IT IS FURTHER ORDERED that nothing contained herein shall deprive the complainant of any right of appeal which he may have from the granting of the defendants' said motion in this case, or from the order or orders in any or all of said cases, suspending complainant's motion for temporary injunction therein, to the Circuit Court of Appeals for the Ninth Circuit.

The said cases or suits referred to are pending in this court on behalf of said complainant, the numbers of such suits, and defendants therein being as follows:

Anaheim Orange Growers' Association, No. A-43.

Pomona Fruit Growers' Exchange, No. A-44.

Whittier Citrus Association, No. A-45.

Indian Hill Citrus Association, No. A-49.

El Camino Citrus Association, No. A-50.

Pattee & Lett Fruit Company, No. A-51.

Colton Fruit Exchange, No. A-52.

Sierra Madre & Lamada Citrus Association, No. A-53.

Claremont Citrus Association, No. A-54.

La Verne Orange Growers' Association, No. A-55.

Lyman V. W. Brown, No. A-56.

Walnut Fruit Growers' Association, No. A-57.

Redlands Heights Orange Growers' Association,
No. A-58.

Placentia Orange Growers' Association, No. A-70.

San Dimas Orange Growers' Association, No. A-71.

I. L. Lyons & Sons, No. A-73.

Elephant Orchards, No. A-74.

El Cajon Citrus Association, No. A-77.

Orange Heights Fruit Association, No. A-78.

Fernando Fruit Growers' Association, No. A-86.

Antelope Heights Orange Company, No. A-8 in the
Northern Division of this Court.

Charles C. Chapman, No. A-64.

Covina Orange Growers' Exchange, No. A-66.

West Ontario Citrus Association, No. A-65.

Edmund Peycke Company, No. A-67.

La Habra Citrus Association, No. A-62.

George D. Parker, No. A-90.

Denman Fruit Company, No. A-75.

El Ranchito Citrus Association, Cir. Ct. No. 1675.

Fay Fruit Company, No. A-63.

Redlands Heights Orchards, Ltd., No. A-76.

Los Angeles, California, February 18th, 1914.

District Judge."

Now the condition of the above obligation is such, that if the said defendants Riverside Heights Orange Growers' Association and George D. Parker and each of them will pay to complainant any and all judgment or judgments rendered in favor of complainant and against them or either of them, jointly or severally, in suit Circuit Court No. 1562, it being

hereby stipulated that any such judgment or judgments in said suit shall and may be at the time of the entry thereof against said defendants docketed and entered against such surety or sureties, then the above obligation to be void, otherwise [54] to remain in full force and virtue.

RIVERSIDE HEIGHTS ORANGE GROWERS' ASSOCIATION,

By H. D. FRENCH, Pres.

[Seal]

C. B. BAYLEY, Sec'y.

GEORGE D. PARKER,

THE UNITED STATES FIDELITY &
GUARANTY COMPANY,

By VAN R. KELSEY, [Seal]

Its Attorney in Fact.

State of California,

County of Los Angeles,—ss.

On this 21st day of February in the year one thousand nine hundred and fourteen, before me, Hallie D. Winebrenner, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Van R. Kelsey known to me to be the duly authorized attorney in fact of The United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the attorney in fact of said company, and the said Van R. Kelsey duly acknowledged to me that he subscribed the name of The United States Fidelity and Guaranty Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] HALLIE D. WINEBRENNER,
Notary Public in and for Los Angeles County, State
of California.

[Endorsed]: U. S. District Court, Southern District of Calif., Southern Division. Fred Stebler, Compt., vs. Riverside Heights Orange Growers' Assn. & George D. Parker, Defts. In Equity. Cir. Ct. No. 1562. Bond for Judgment Based on Order Restraining Prosecution of Suits. Approved and filed this 21st of February, 1914. Wm. M. Van Dyke, Clerk. N. A. Acker, Foxcroft Building, San Francisco, Calif., Atty. for Defendants. [55]

*In the District Court of the United States, for the
Southern District of California, Southern
Division.*

C. C. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION et al.,

Defendants.

**Conclusions of the Court on Defendants' Motion to
Restrain Prosecution of Pending Suits, and the
Institution of Others. [56]**

1.

Complainant has thus far utilized the patent by

manufacturing and selling directly to users his patented machines, and in this case has sued for and recovered of infringing manufacturers, who also sold directly to users, profits and damages.

2.

The Master has full power to inquire into and find all acts of infringement by either *part*, and to award profits and damages for all such infringing acts. (Robinson on Patents, section 1153, and note cited; *Tatham vs. Lowber*, 4 Blatch. 86, 23 Fed. Cases, 722, case No. 13,765.)

The accounting is had up to the time of the report. (*Knox vs. Great Western Quicksilver M. Co.*, 6 Sawyer, 430, 14 Fed. Cases, 430, case No. 7947.)

3.

Where a patentee, situated as complainant, recovers from an infringing manufacturer damages and profits on account of the infringement, and the judgment is paid, the purchaser from such manufacturer, who is a user of the machine, has the same right to such use as he would have were he a licensee from the patentee, that is, the right to use continues during the life of the patented machine. (*Allis vs. Stowell*, 16 Fed. 783; *Gilbert & Barker Mfg. Co. vs. Bussin*, 12 Blatch. 426, 10 Fed. Cases, 348, case No. 5416; *Perrigo vs. Spaulding*, 13 Blatch. 389, 19 Fed. Cases, 260, case No. 10,994; *Spaulding vs. Page*, 4 Fisher, 621, 22 Fed. Cases, 892, case No. 13,219; *Stutz vs. Armstrong et al.*, 25 Fed. 147; *Fisher et al. vs. Consolidated A. Mine, etc.*, 25 Fed. 201; [57] *U. S. Printing Co. vs. American Playing Card Co.*, 70

Fed. 50; Kelley vs. Ypsilanti etc. Mfg. Co., 44 Fed. 19.)

The case on which complainant largely relies, Birdsell vs. Shaliol, 112 U. S. 185, does not conflict, but is in harmony with this doctrine. While the Court, in that case, holds, that payment by an infringing manufacturer of damages only will not vest in him any right to the future of the infringing machine, yet the Court seemingly recognizes the rule, that full compensation to the patentee does free the infringing machine from the monopoly, the language of the Court being:

“If one person is in any case exempt from being sued for damages for using the same machine for the making and selling of which damages have been recovered against and paid by another person, it can only be when actual damages have been paid, and upon the theory that the plaintiff had been deprived of the same property by the acts of two wrongdoers, and has received full compensation from one of them.”

Payment of damages and profits is full compensation.

The law on this subject is well stated in Perrigo vs. Spaulding, *supra*, as follows:

“But, where the patentee sells his patented instrument or machine for use by others, finding his remuneration in the profit of the sale of the manufactured machine or instrument, it is obvious that his interest is promoted by increasing the sale, and that into his profit enters the value

of the patented invention over and above the cost of manufacture and the ordinary fair profit of the manufacture. Even if no patent or license fee is fixed, the value thereof, as a profit, enters into the selling price, and if not capable of exact ascertainment, [58] may, nevertheless, be approximated to by estimation, when necessary. When the patentee sells, he receives this profit, and thus obtains full compensation for the article sold and for the right to use it while it lasts. When, for an infringement, he obtains both the profits and damages, he will be presumed to have obtained a full compensation for all the injury he has sustained, and to be placed in as good a position as if he had made and sold the article himself. Such is, I think the presumption between parties thus situated, and, if any different rule is sought to be applied in any particular case, it should appear that a recovery has not been sought or obtained for the whole gains of the manufacture as well as for all damages sustained. *Spaulding vs. Page*, before cited; *Gilbert & B. Manufacturing Co. vs. Bussing* (Case No. 5,416). When a patentee manufactures and sells his patented article for use, the right to use passes by the sale. If an infringer manufactures and sells, he must account for and pay the profits, which are to be calculated upon the principle that the gain by the appropriation by the patentee's invention is their measure. If there are damages sustained and proved by the plaintiff, beyond the

profits made by the infringer, these also may be recovered. But, when a full recovery and satisfaction has been had, the patentee has obtained all that the law gives him, and the particular article or machine, if it be a machine, becomes, in effect, licensed by the patentee, and may be used so long as it lasts, free from any further claim by the patentee.”

To the same effect, in *Spaulding vs. Page, supra*, the Court says: [59]

“Where a patentee does not use the patented machine himself, nor establish a patent fee, but manufactures the patented article, and sells at fixed prices, seeking his compensation in the profits of the manufacture and sale at such fixed prices, and another party infringes the patent by making and selling the patented article; and where the patentee sues the party so infringing, and claims to recover, and does recover the full amount of profits which he himself would have obtained on said articles had he manufactured and sold them at his ordinary prices, by such claim and recovery he adopts the sale made by the party infringing, and the right to use the specific article so sold, and for which the recovery has been had, vests in the purchaser.”

In *U. S. Printing Co. vs. American Playing Card Co., supra*, another case cited by complainant, the same rule is stated thus:

“Where a patentee takes a decree for profits against a manufacturing infringer, he thereby

sets the manufactured machine free. The distinction is obvious. In such cases the profits of the infringer are full compensation to the complainant for the wrong done him by the unauthorized manufacture and sale of the infringing machine; but, where there is merely a settlement or judgment for damages, it is only for damages in the past, and has no relation to the future."

The distinction between the recovery of mere damages and a recovery of damages and profits is expressly recognized in another of the cases cited by complainant, *Computing Scale Co. vs. National C. S. Co.*, 79 Fed. 962, 966, where the Court says:

"As to the prayer for an injunction against suing users [60] who have purchased from defendants, the complainant's bill as framed prayed for an injunction and account of profits, as well as for damages against the defendant company. Upon the argument of the motion, the bill, not having been answered, was amended by striking out the prayer for an account of profits, leaving only the claim for damages. This brings the case directly within the rule laid down in *Birdsell vs. Shaliol*, 112 U. S. 485. The right of the complainant, under the authority of that case, to sue the users, is undeniable; and, if the right to sue exists, the right to warn by letters, or by circulars, or by advertisements in newspapers, exists, and cannot be enjoined."

In Kelley vs. Ypsilanti etc. Mfg. Co., *supra*, another case relied on by complainant, the Court says:

“So, in Allis vs. Stowell, 16 Fed. Rep. 783, in which the injunction was denied, it was intimated that, ‘where a patentee recovers from an infringing manufacturer full damages and profits on account of the infringement, the purchaser from such manufacturer, who is a user of the machine, will be protected in such use against a suit for infringement, as he would be if he were a licensee from the patentee.’ In this view of the law it was held that, to prevent a multiplicity of suits, the Court might, in a proper case, and on proper showing, require the prosecution of suits between a patentee and a mere user of the patented machine to be suspended, to await the result of the suit between the patentee and the principal infringer from whom the user purchased this machine,—a doctrine in which we fully concur, although we think the application should be made to the courts in which these suits are pending.”

It should be observed, that this enunciation was by [61] Brown, then District Judge for the Eastern District of Michigan, subsequently Associate Justice of the Supreme Court of the United States, not only an eminent jurist, but one notably learned in the patent law, and that, in the opinion in which the enunciation was made, Birdsell vs Shaliol, *supra*, was considered and discussed.

The distinction between full and partial compen-

sation, that is, between payment of profits and damages and payment of damages alone, seems to be recognized also in a quotation made in complainant's brief from Walker on Patents, 4th edition, section 676, page 276, as follows:

“Where the money recovered in an infringement suit for unlicensed making and selling of a specimen of a patented thing, is recovered as damages for such making and selling alone; that recovery does not operate as an implied license authorizing the use of that specimen.”

4.

While the pendency of a suit for infringement against the manufacturer is no bar to a suit against users of machines bought from the manufacturer, still, if the patentee sues the manufacturer for profits as well as damages, a court of equity, in a proper case, will restrain the suit against the users until the termination of the suit against the manufacturer. (*Birdsell vs. Hagerstown A. I. Mfg. Co.*, 1 Hughes, 64, 3 Fed. Cases 450, case No. 1437; *National C. R. Co. vs. Boston C. I. & R. Co. et al.*, 41 Fed. 51.)

In the latter case the Court says:

“The power of a court of equity, by petition in the main suit against a manufacturer, to restrain a complainant from [62] bringing further suits against the purchasers or users of a patented article, seems to be recognized in this country, and to be founded upon sound principles of equity. *Ide vs. Engine Co.*, 31 Fed. Rep. 901; *Allis vs. Stowell*, 16 Fed. Rep. 783; *Bird-*

sell vs. Manufacturing Co., 1 Hughes (U. S.), 64. Also the unreported cases of National Cash Register Co. vs. Bensinger Self-Adding Cash Register Co., decided by Judge Blodgett in the Northern District of Illinois, and Consolidated Store Service Co. vs. Lamson Consolidated Store Service Co., decided by Judge Nelson of this District. Recognizing the existence of the power of this Court to restrain the complainant, as prayed for, the only question which remains is whether the defendants have made out a case upon their affidavits which entitles them to this relief. I think an examination of the affidavits shows that the numerous suits brought by the complainant against the customers of the defendants are vexatious and oppressive, and that therefore an injunction should be granted as prayed for.”

The pending suits against users, thirty-one in number, and similar suits which complainant threatens to bring, are, and would be, I think, under all the circumstances of this case, oppressive, and accordingly defendants’ motion will be allowed to the extent of enjoining complainant from further prosecuting the pending suits, or bringing other similar suits, until final decree herein, or until otherwise ordered by this Court, provided defendants, within five days, file a bond in the sum of Ten Thousand Dollars, with good and sufficient sureties, to be approved by the Clerk of this court, for the payment of any damages and profits that may be adjudged against [63] them in this suit.

Defendants' attorney will prepare an order in conformity with these conclusions, and, after serving a copy on complainant's attorney, submit the original to this Court for its action thereon.

OLIN WELLBORN,
Judge.

[Endorsed]: C. C. No. 1562. U. S. District Court, Southern District of California, Southern Division. Fred Stebler vs. Riverside Heights O. G. Assn. et al. Conclusions of the Court on Defendants' Motion to Restrain Prosecution of Pending Suits, and the Institution of Others. Filed February 18, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [64]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION and GEORGE D. PARKER,
Defendants.

Petition for Order Allowing Appeal.

The complainant in the above-entitled suit, conceiving himself aggrieved by the order made and entered by said Court in the above-entitled cause on the 18th day of February, 1914, granting defendants' motion that complainant be enjoined and restrained from

any further prosecution of those certain suits set forth in said order and from bringing any other suit or suits against users of machines manufactured in substantial accordance with letters patent of the United States No. 997,468, and ordering that complainant be so enjoined as in said order set forth, comes now by Frederick S. Lyon, Esq., his solicitor and counsel, and petitions said Court for an order allowing complainant to prosecute and appeal from said order granting said injunction and restraining complainant as aforesaid, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the sum of security which complainant shall give and [65] furnish upon such *such* an appeal.

And your Petitioner will ever pray.

FREDERICK S. LYON,

Solicitor and of Counsel for Complainant.

[Endorsed]: Cir. Ct. No. 1562. United States *Circuit* Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association and George D. Parker, Defendants. Petition for Order Allowing Appeal. Filed Mar. 4, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. [66]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION and GEORGE D. PARKER,
Defendants.

Assignments of Error.

Comes now the complainant above named and specifies and assigns the following as the errors upon which he will rely upon his appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree or order of February 18th, 1914, enjoining and restraining complainant in the above-entitled suit:

1. That the District Court of the United States for the Ninth Circuit, Southern District of California, Southern Division, was without jurisdiction in said cause to make said order;

2. That the District Court of the United States for the Ninth Circuit, Southern District of California, Southern Division, erred in granting defendants' said motion;

3. That said Court erred in ordering, adjudging or decreeing that complainant be enjoined or restrained from any further prosecution of the suits enumerated in said order of February 18th, 1914, or any thereof; [67]

4. That said Court erred in ordering, adjudging, or decreeing that complainant be enjoined or restrained from bringing any other suit or suits against users of machines manufactured in substantial accordance with letters patent of the United States No. 997,468;

5. That said Court erred in holding that in this suit an accounting under the interlocutory decree herein is not limited to the acts of joint infringement and the profits and damages which the respective defendants have respectively received from or inflicted upon complainant by such joint infringement, and in holding that the Master has full power to inquire into and find all acts of infringement by either defendant herein irrespective of whether such acts were joint or in any manner part of the joint infringement or were the joint acts of one of these defendants and other persons, not parties hereto, and not connected with the other defendant herein;

6. Said Court erred in holding that any judgment whatever could be rendered in this suit which would operate as a license to all or any of the respective defendants in the thirty-one suits enjoined in and by said order of February 18th, 1914, to continue the use of the respective infringing machines in the possession and use of said respective defendants;

7. Said Court erred in holding that any judgment which could be rendered in this suit would operate as a license to free any or all of the machines manufactured by the defendant George D. Parker, in infringement of the reissue patent sued on herein;

8. Said Court erred in holding that "where a patentee, situated as complainant, recovers from an

infringing [68] manufacturer damages and profits on account of the infringement, and the judgment is paid, the purchaser from such manufacturer, who is a user of the machine, has the same right to such use as he would have were he a licensee from the patentee, that is, the right to use continues during the life of the patented machine."

9. Said Court erred in holding that said thirty-one suits enumerated in said order of February 18th, 1914, are, or the further prosecution thereof would be, oppressive;

10. Said Court erred in not holding that inasmuch as no judgment freeing the machines in use by the defendants in and involved in the thirty-one suits enumerated in said order of February 18th, 1914, has been rendered herein and has been satisfied in full, complainant was entitled to prohibit any further use of such machines until such time as the defendants therein had acquired a license from complainant authorizing the further use of such machines;

11. Said Court erred in not finding and holding that any judgment which might or could be rendered in this suit against either of said defendants would not authorize or license the continuation in use of the machines now in the possession of the defendants in and involved in the thirty-one suits enumerated in said order of February 18th, 1914;

12. Said Court erred in not holding that complainant was entitled to prohibit the continuation by the defendants in said thirty-one suits, and each thereof, of the unlawful infringement of reissue let-

ters patent No. 12,297 until such time at least as the use of such machines became lawful.

In order that the foregoing assignments of error may be and appear of record, the complainant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws of the United States. [69]

WHEREFORE, the said complainant prays that the said order of this Court made and entered on February 18th, 1914, enjoining and restraining complainant be reversed and that the United States District Court for the Southern District of California, Southern Division, be directed to enter an order setting aside the said order or decree of February 18th, 1914.

All of which we respectfully submit.

FREDERICK S. LYON,

Solicitor and of Counsel for Complainant.

[Endorsed]: Cir. Ct. No. 1562. United States *Circuit* Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association and George D. Parker, Defendants. Assignments of Error. Filed Mar. 4, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. [70]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION and GEORGE D. PARKER,
Defendants.

Order Allowing Appeal, etc.

In the above-entitled cause, the complainant having filed his petition for an order allowing an appeal from the order of this Court made and entered February 18th, 1914, together with assignments of error;

Now, upon motion of Frederick S. Lyon, Esq., solicitor for complainant, it is ordered that said appeal be, and hereby is, allowed to complainant, to the United States Circuit Court of Appeals for the Ninth Circuit, from the said decree or order made and entered by this Court in this cause on February 18th, 1914, that complainant be enjoined and restrained from any further prosecution of those certain suits set forth in said order, and from bringing any other suit or suits against users of machines manufactured in substantial accordance with letters patent of the United States No. 997,468, and that the amount of complainant's bond on said appeal be, and the same is hereby, fixed at the sum of Two Hundred and [71] Fifty Dollars (\$250.00).

IT IS FURTHER ORDERED, that upon the filing of such security a certified transcript of the records and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit, in accordance with the rule in equity of the Supreme Court of the United States and the statutes made and provided.

Dated March 4th, 1914.

OLIN WELLBORN,
Judge.

[Endorsed]: Cir. Ct. No. 1562. United States Circuit Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights O. G. Association and George D. Parker, Defendants. Order Allowing Appeal, etc. Filed Mar. 4, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. [72]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS'
ASSOCIATION and GEORGE D. PARKER,
Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Riverside Heights Orange Growers' Association and George D. Parker, defendants in the above-entitled suit, in the penal sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said Riverside Heights Orange Growers' Association and George D. Parker, their heirs and assigns for which payment, well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors, and assigns firmly by these presents.

Sealed with corporate seal and dated this 5th day of March, 1914.

The condition of the above obligation is such that whereas the said Fred Stebler, complainant in the above-entitled suit, is about to take an appeal to the United States [73] Circuit Court of Appeals for the Ninth Circuit, to reverse an order or decree made, rendered, and entered on the 18th day of February, 1914, by the District Court of the United States, for the Southern District of California, Southern Division, in the above-entitled cause by which the complainant, Fred Stebler, was enjoined and restrained from any further prosecution of those certain suits set forth in said order and from bringing any other suit or suits against users of machines manufactured in substantial accordance with letters patent of the

United States No. 997,468:

NOW, THEREFORE, the condition of the above obligation is such that if Fred Stebler shall prosecute his said appeal to effect and answer all costs which may be adjudged against him if he fail to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT CO. OF MD.

By S. T. MACCUBBIN, [Seal]

Attorney in Fact.

HARRY D. VANDEVEER,

Agent.

State of California,

County of Los Angeles,—ss.

On this 5th day of March, 1914, before me, Nelson A. Frazar, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared S. T. Maccubbin, known to me to be the *attorney fact*, and Harry D. Vandever, known to me to be the agent of the Fidelity and Deposit Company of Maryland, the corporation that executed the within instrument, and acknowledged to me that said corporation executed the same; that the signatures to said instrument of [74] said attorney in fact and agent, respectively, are the genuine signatures, respectively, of said S. T. Maccubbin, its attorney in fact, and said Harry D. Vandever, its agent.

[Seal]

NELSON A. FRAZAR,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Cir. Ct. No. 1562. United States Circuit Court, Southern District of California, Southern Division. Fred Stebler, Complainant, vs. Riverside Heights Orange Growers' Association and George D. Parker, Defendants. Bond on Appeal. The within Bond and Surety thereon is hereby approved this 6th day of March, 1914. Olin Wellborn, Judge. Filed March 6, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. [75]

UNITED STATES OF AMERICA.

*District Court of the United States Southern District
of California, Southern Division.*

CLERK'S OFFICE.

IN EQUITY—Cir. Ct. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROW-
ERS' ASSOCIATION and GEORGE D.
PARKER,

Defendants.

Praeipie [for Transcript of Record on Appeal].

To the Clerk of said Court:

Sir: Please prepare as a transcript of record on the appeal in this suit by complainant from the order of February 18, 1914, a copy of each of the following, and duly certify the same as the Transcript on

said Appeal, in accordance with Rule 75 of the Equity Rules of the Supreme Court:

The bill of complaint;

The answer of defendants;

The interlocutory decree;

Defendants' petition to enjoin prosecution of suits for infringement;

The affidavit of George D. Parker (verified November 15, 1913, and filed in support of said petition);

The order of February 18, 1914, granting said petition or motion of defendants;

The bond filed on behalf of defendants under said order;

The conclusions of the Court deciding said petition or motion of defendants.

FREDERICK S. LYON,

Solicitor for Complainant.

[Endorsed]: Cir. Ct. No. 1562. U. S. District Court, Southern District of California, So. Division. Fred Stebler vs. Riverside Heights Orange Growers' Assn. Praecipe for Transcript of Record on Appeal. Filed Mar. 21, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [76]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

*In the District Court of the United States of America
in and for the Southern District of California,
Southern Division.*

C. C. No. 1563.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROW-
ERS' ASSOCIATION and GEORGE D.
PARKER,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing seventy-six typewritten pages, numbered from 1 to 76 inclusive, and comprised in one volume, to be a full, true and correct copy of the Bill of Complaint, Answer, Interlocutory Decree, Defendants' Petition to Enjoin Prosecution of Suits for Infringement, Affidavit of George D. Parker, Order of Court Granting said Petition, Bond for Judgment based on Order Restraining Prosecution of Suits, Conclusions of the Court on Defendants' Motion to Restrain Prosecution of Pending Suits and the Institution of Others, Petition for Order Allowing Appeal, Assignment of Errors, Order Allowing Appeal, Bond on Appeal, and Praecipe for Transcript of Record on Appeal, in the above and therein entitled

cause, and that the same together constitute the record in said cause, as specified in the Praecipe filed in my office on behalf of the appellant, by his attorney of record, on complainant's appeal to the United States Circuit Court of Appeals for the Ninth Circuit from [77] the order made and entered by the above-entitled District Court in said cause on the 18th day of February, 1914, that complainant be enjoined and restrained from any further prosecution of those certain suits set forth in said order, and from bringing any other suit or suits against users of machines manufactured in substantial accordance with letters patent of the United States No. 997,468.

I do further certify that the cost of the foregoing record is \$40 10/00, the amount whereof has been paid me on behalf of Fred Stebler, the appellant in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 28th day of March, in the year of our Lord one thousand nine hundred and fourteen and of our Independence the one hundred and thirty-eighth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [78]

[Endorsed]: No. 2394. United States Circuit Court of Appeals for the Ninth Circuit. Fred Stebler, Appellant, vs. Riverside Heights Orange Growers' Association and George D. Parker, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Received and filed April 1, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2394.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Fred Stebler,

Complainant, Appellant,

vs.

**Riverside Heights Orange Grow-
ers Association and George D.
Parker,**

Defendants, Appellees.

APPELLANT'S BRIEF.

This case comes before this court on an appeal by complainant from an order of the District Court of the United States for the Southern District of California, Southern Division, allowing defendants an injunction enjoining and restraining complainant from prosecuting certain suits to enjoin infringements by others of the re-issue patent herein sued on or from bringing any further or other suit or suits against anyone who may have made, used, or sold a fruit grading machine substantially embodying the construction illustrated and described in the Parker Patent No. 997,468, whether acquired from or through either of these defendants.

This suit was instituted in May, 1910, by complainant against these two defendants who were constructing in the packing house of the Riverside Heights Orange Growers Association at Riverside, California, for use therein, five graders in substantial accordance with said Parker Patent No. 997,468.

Upon final hearing in the lower court this suit was dismissed, the lower court holding that such so-called Parker grader was not an infringement. Upon appeal to this court such decree of dismissal was reversed and the case remanded with instructions to grant the relief prayed in the bill of complaint. The opinion of this court on such hearing is reported in

²⁰⁵
~~210~~ *Federal Reporter*, 735.

Upon the filing of the mandate of this court in the District Court for the Southern District of California, a decree in conformity with such mandate was entered and an injunction issued, enjoining both of these defendants from any further manufacture, use, or sale of the so-called Parker grader, and this injunction still remains in force, and defendant Riverside Heights Orange Growers Association is still in possession of the five infringing machines which formed the basis of this suit and which were complained of in the bill of complaint herein.

Although this suit was instituted *in May, 1910*, and has been vigorously prosecuted by complainant, the only relief that complainant has as yet received has been the issuance of the injunction *in November, 1913*, enjoining the defendants from the further use of in infringing machines. *No accounting has been had nor*

has any judgment for damages or profits been rendered against the defendants or paid to the complainant.

The action of the District Court, from which this appeal was taken, denies the complainant any relief against the continued infringement of these letters patent by between forty and fifty individuals and concerns having no connection, in any manner, with the Riverside Heights Orange Growers Association, although no defense of any kind is interposed in their behalf, the answers in the suits brought against them being each a duplicate of the answer of the defendants in this case, and such forty or fifty others continue their infringing use protected in their piracies by this injunction of the District Court, and complainant must stand idly by and see his property used without his consent and without compensation to him. He is compelled to spend his money in litigation and is enjoined from securing any protection by the courts.

The bill of complaint in this case alleged a joint tort by the two defendants herein, Riverside Heights Orange Growers Association and George D. Parker, in the making and use of these infringing machines. The evidence showed that they were built by defendant Parker for the Riverside Heights Orange Growers Association and in its packing house at Riverside, California.

Defendant George D. Parker, however, after the filing of the bill in this suit, continued engaged, individually and alone, in the manufacture and sale generally of infringing machines embodying substantially the same construction. The defendant Riverside Heights Orange Growers Association has had no part

therein nor has it in any manner been connected with or privy to said Parker's further acts of infringement. On the contrary, various other persons, corporations, and associations have each jointly with said Parker, but without joint action or interest with each other, infringed the patent herein sued on, and have thereby been joint tort feasons with defendant Parker (but not with defendant Riverside Heights Orange Growers Association) in some forty or fifty separate and independent torts committed against complainant's property in the said reissue Letters Patent by the sale and use of infringing machines.

It is elementary that complainant could not have joined in one suit as parties defendant both Mr. Parker and each of the several corporations or associations for whom Mr. Parker built infringing machines and who respectively jointly with Mr. Parker, infringed complainant's patent,—Mr. Parker by the making and sale and each of these corporations or associations by causing the same to be made and by using,—*because* there was no joint liability of the several corporations or associations and no joint act of such several corporations or associations and no privity of interest between any two of them in their respective infringing acts or torts. It is clear that a bill of complaint which joined as parties defendant corporations who were not privy to or in any manner interested in the acts of each other would be multifarious.

Complainant's first proposition, therefore, is that:

This suit is limited to and cannot extend beyond the joint act or acts of the defendants herein; that while full recovery can be had herein of all profits received

by either of the defendants *arising out of the joint acts of these defendants* and recovery can be had of all damages suffered by complainant by reason of *any joint act or acts of the defendants*, the bill of complaint cannot be extended to cover the individual and independent acts of one of the defendants in which the other defendant had no part and to which the other defendant was not privy or in any manner interested or connected.

If this proposition states the correct rule of law, then the order of the District Court enjoining this complainant from proceeding against other persons who, *not connected with any joint act of these defendants*, have infringed upon complainant's patent, either by manufacture, use, or sale, is erroneous, for the reason that in this suit complainant can have no remedy whatever against such independent infringement.

Complainant does not deny that on an accounting in equity the master will inquire into what profits each of the joint defendants have respectively made out of the joint act or tort, whether or not each defendant has partaken or shared in all the profits accruing from such joint act or acts, but submits that any accounting must be limited to the joint acts of the defendants and that such an accounting cannot embrace *acts of one of the defendants independent of the other defendant* and either alone or in connection with parties not made defendants in the suit, for such are not a part of the cause of action set forth in the bill of complaint and are independent causes of action not directly embraced within the cause of action set forth in the bill of complaint.

The complainant submits this proposition to the court for its determination *in limine* for the reason that if it be well founded in law and fact then the entire theory upon which the District Court acted is moot and no judgment can be rendered herein, even under the theory of the law applied by the District Court, which would have any effect whatever upon complainant's rights of action against either Mr. Parker or against any one of said other corporations or associations for such independent tort or torts and it is *necessary* for complainant to prosecute and bring the suits enjoined, otherwise it is impossible for him to enforce his rights. This question must be decided before it can be determined whether any judgment can possibly be rendered in this case which could effect the result *anticipated* by the District Court.

The liability of joint tort feasons is joint and several and where a judgment for damages is rendered for a tort the judgment is rendered against all joint tort feasons jointly and severally.

Cooley on Torts, page 136:

The interlocutory decree in this case directs the master to ascertain the damages suffered by complainant from the joint tortious acts of the defendants. Any judgment for damages, therefore, will be against the two defendants jointly and severally and the doctrine of contribution does not apply to such a judgment. It is clear that if this was an action at law for damages the recovery would be limited to such damages as complainant had suffered by reason of the joint acts of the defendants, and inasmuch as equity follows

the law in the enforcement of purely legal remedies, and the assessment of damages is a purely legal remedy, it is submitted that equity will follow the law in respect to any assessment of damages in this suit, and such damages must arise out of the joint acts of the defendants.

It is true that the interlocutory decree in this case also directs the master to ascertain the profits derived by the defendants from the infringement of complainant's property. It is submitted that this means the profits derived from the joint infringement. We call the court's attention to the fact that one of the first things requisite upon such an accounting is an election by the complainant as to whether he will take the profits or damages, and in this connection we call the court's attention to the fact that the opinion of the lower court seems to be entirely based upon the theory that complainant will elect damages and this is, perhaps, the fact as it is probably utterly impossible to prove or to ascertain what profits the defendants have actually derived from the infringement.

This suit presents a rather unusual situation. In May, 1910, the defendant, Riverside Heights Orange Growers Association, contracted with the defendant Parker to build for it five infringing graders in its packing house at Riverside, California. Before the completion of any of these machines this suit was instituted by complainant against the defendants. Upon the decision by this court sustaining complainant's bill of complaint and determining that such machines were an infringement of complainant's patent, an injunction

was issued against defendants as prayed in complainant's bill.

In the meantime the defendant Parker had manufactured between eighty and a hundred other infringing machines *for other persons, firms, and corporations*. All of these machines are still in use, in the hands of the purchasers, and are being continuously used by such purchasers. *The complainant is compelled by the injunctional order of the District Court to sit by idly and permit his property to be used by others without his consent and against his will and in open, notorious, and admitted defiance of his patent rights as established by the mandate of this court. It is admitted that none of these infringers have yet acquired any right or license to use any of these machines.*

By means of this injunctional order of the District Court these infringers are enabled to continue the piracy of complainant's property and set at naught the decision of this court, and this upon the mere assumption that *perhaps* in an accounting of profits or damages in this case some judgment may be entered which will, *if it is paid by these defendants*, grant to these other infringers a free license *to then continue* the use of such machines, *although it cannot be pretended that at the present time any of such persons, firms, or corporations have acquired any such right*. This does not seem just or equitable. It would seem that before complainant's property should be taken from him he should be at least compensated therefor. It may be years before it is finally determined whether such judgment is sufficient to free such machines or whether it will be paid in full. It may be years before complainant re-

ceives a dollar from either of these defendants and the order of the District Court is a compulsory license, compelling the complainant to permit the continued and continuing invasion of his property without any color of right whatever in these other infringers, and compelling complainant to expend time and money in an attempt to collect damages for such wrongful appropriation and use of his property. It seems unjust to use the process of a court of equity to thus protect a wrongdoer in his wrongdoing and thus place on the property owner the burden and expense and risk of collecting compensation therefor through the courts, when in law, equity, and fair dealing the complainant should be compensated *before* his property is taken. Even ultimate collection of legal “damages” or “profits” would leave complainant loser by reason of the expense of the litigation thus forced upon him. Should not at least the actual payment have been required before these infringers can be said to “do equity”?

Inasmuch as the bill of complaint in this particular suit could not reach to enjoin these other persons, firms, and corporations from continuing such unlawful and unlicensed use of the infringing machines, it was necessary for the complainant to bring separate suits against each of said individuals, persons, firms, corporations, and associations who were infringing by use. In no other way could injunctions be secured which would prohibit the respective infringements. No defense on the merits existed in behalf of these infringers; they bought their machines with full knowledge of the claim of complainant that they were infringements of the

patent in suit, and complainant submits it was the duty of the District Court to have granted complainant temporary injunctions in each of the suits referred to in the injunctional order to protect and maintain complainant's right of property in his letters patent until such time at least as the users had acquired a license under the letters patent, whether such license be acquired direct by contract from the complainant or by operation of law. It is submitted that the District Court erred in enjoining the further prosecution of said suits and in refusing to grant any relief to this complainant under the circumstances of the case. *Must this complainant sit idly by and see sixty or more persons, firms, and corporations every day using his property against his will, without his license or consent, in admitted violation of his rights of property, and without any certainty that he would ever receive any compensation therefor?*

Complainant submits that after having litigated the validity of his letters patent through the court of last resort, and having litigated through the court of last resort the question of infringement, that he was entitled to the protection of his right of property in full accord with the spirit as well as the letter of this court's mandate, and the infringing user should have the burden placed upon him of showing *a present right* to free use before he was permitted to continue such use and should not be permitted to continue such use in defiance of complainant's rights upon the mere theory that perhaps some day and somehow complainant would be compensated for this invasion of complainant's rights. *Defendants should be required to do*

equity before asking such extraordinary relief of a court of equity.

The unfairness, unjustness, and inequity to complainant of the order of the District Court and of the defendants' motion is illustrated by the further consideration that this court has determined that defendant Parker has pirated *the business of complainant* in the manufacture and sale of fruit graders under the patent in suit; that each of the infringing machines involved in the suits, the prosecution of which is enjoined, is in effect stolen property; that each of the users is in possession of stolen property. Yet these defendants ask that complainant be enjoined from protecting his own property, that he be enjoined from doing lawful acts to protect and enforce his rights of property against those who have not even a color of title and no vestige of equity in their possession or use of the property. The case falls directly within the decision of Circuit Judge Sanborn, in

Kryptok Co. v. Stead Lens Co., 190 Fed. 767,
769,

where, in speaking for the Circuit Court of Appeals for the Eighth Circuit, and in reversing an injunction granted by the lower court prohibiting the patent owner from proceeding with suits against purchasers and users when the patent owner had a suit pending against the manufacturer, said:

“Established principles of equity jurisprudence
“are that one may not be enjoined from doing law-
“ful acts to protect and enforce his rights of prop-
“erty or of person, unless his acts to that effect
“are clearly shown to be done unnecessarily, not
“for the purpose of preserving and enforcing his

“rights, but maliciously to vex, annoy, and injure another.”

“The fact that defendants are only users is not sufficient to defeat a motion for a preliminary injunction, for infringement by a user may be as irreparable as any.”

See also

Allington & Curtis Mfg. Co. v. Booth, 72 Fed.
772.

In this last decision the court makes particular mention of the fact that the complainant had offered to replace the infringing devices or to give a license, the complainant, of course, setting the price for substitution and the amount of the license fee. The court did deny the temporary injunction upon the deposit of such license fee, but the decision squarely approves this complainant's position, that he is entitled to sell to these individual defendants any grader embodying this invention which they use and that he is entitled to enjoin the use of infringing graders.

In this case it is complainant's position that complainant has the right to sell to these forty or fifty infringers any grader embodying this invention which they use, and that before the court should grant an injunction against complainant's proceeding to enforce his rights against the infringing users of such graders the lower court should have done equity to complainant. This complainant would not have brought this case to this court or have complained had the District Court, as a condition precedent to the granting of the injunctive writ herein, have ordered each of the users of such infringing machines to have paid to complainant

a reasonable license fee, but to sanction the unlawful and infringing use of these machines by these various independent and individual infringers without compensation to complainant, can hardly be said to be equitable, and it is submitted under the authorities cited the commencement or the prosecution of the several suits enjoined cannot be held to be either malicious or vexatious inasmuch as the several defendants in such suits are admittedly continuing, without any right to do so, the use of complainant's property and without any defense existing therefor.

One of the grounds of defendant Parker's motion is that complainant is interfering with Mr. Parker's customers. This is a most remarkable contention in view of the history of this litigation and the interlocutory decree herein. This court by its interlocutory decree has determined that this business was not Mr. Parker's; that in the legal sense and in the true sense these individual using defendants were not Parker's customers; that had it not been for the unlawful and wrongful acts of defendant Parker they would have been complainant's customers; that defendant Parker's alleged business was a piratical business. Complainant's position falls directly within the decision of Judge Sanborn in *Kryptok Co. v. Stead Lens Co.*, above referred to, and his action in bringing suits against and asking temporary injunctions against the users is "*for the purpose of preserving and enforcing his rights*" and his business, and there is not a scintilla of evidence upon which this court can base a finding of fact or a conclusion of law that complainant by these suits or by motions for temporary injunctions therein, is either

malicious, or proceeding against the users maliciously, either to vex, annoy, or injure them or Mr. Parker or anyone else. Complainant seeks solely to protect his property from unlawful appropriation. These users stand before this court confessed infringers and it is within the clear right of Mr. Stebler to protect his property and enforce his rights of property, as referred to by Judge Sanborn, and in this he should have, according to every principle of equity jurisprudence and good conscience, the assistance of a court of equity against those who are continuing to use his property without his license or consent, in violation of his rights and in open defiance thereof, instead of being enjoined by such court of good conscience from appealing to such court for its protection against the unlawful seizing and use of his property.

The District Court made the injunction order appealed from [Transcript, pages 56-58] upon the theory that

“Where a patentee, situated as complainant, re-
“covers from an infringing manufacturer damages
“and profits on account of the infringement, and
“the judgment is paid, the purchaser from such
“manufacturer, who is a user of the machine, has
“the same right to such use as he would have were
“he a licensee from the patentee, that is, the right
“to use continues during the life of the patented
“machine. (Allis v. Stowell, 16 Fed. 783; Gilbert
“& Barker Mfg. Co. v. Bussin, 12 Blatch. 426, 10
“Fed. Cases 348, case No. 5416; Perrigo v. Spauld-
“ing, 13 Blatch. 389, 19 Fed. Cases 260, case No.
“10994; Spaulding v. Page, 4 Fisher 621, 22 Fed.
“Cases 892, case No. 13219; Stutz v. Armstrong
“*et al.*, 25 Fed. 147; Fisher *et al.* v. Consolidated
“A. Mine etc., 25 Fed. 201; U. S. Printing Co. v.

“American Playing Card Co., 70 Fed. 50; Kelley
“v. Ypsilanti etc. Mfg. Co., 44 Fed. 19.)” [Trans-
script of Record, pages 61-62.]

Complainant submits that this theory is erroneous
and in direct opposition to the rule of law announced
and applied by the Supreme Court in

Birdsell v. Shaliol, 112 U. S. 485.

In this contention complainant is supported by a long
list of decisions. The first to which attention is di-
rected is the decision of then District Judge Brown,
afterwards associate justice upon the Supreme Bench, in

Kelley v. Ypsilanti Dress Stay Mfg. Co., 44
Fed. 19-21,

in which it is said:

“With regard to the commencement of new
“suits, there are undoubted authorities which sup-
“port the contention of the defendant; but most
“of them seem to be founded upon an impression
“with regard to the rights of a patentee against
“infringers which the Supreme Court has held to
“be erroneous. Thus, in *Birdsell v. Manufactur-*
“*ing Co.*, 1 Hughes 64, where a similar application
“was made by a defendant who had been sued for
“manufacturing and selling a patented machine for
“hulling and threshing clover, it was held that an
“injunction should be granted, the court giving as
“a reason:

““That the defendants were thoroughly re-
“sponsible, and that upon the original suit being
“carried on to completion, if recovery was made,
“the complainant would recover in that suit all
“the profits that defendants had obtained from
“the wrongful manufacture, and the damages that
“he had suffered by reason of the wrongful manu-
“facture, and that complainant would therefore
“be put in the same position as if he had orig-
“inally sold all the machines; that, this being the

“‘case, he ought not to be allowed to interfere
“‘with the vendees of defendants while the suit
“‘against them was pending.’”

“Yet, in a subsequent case upon the same patent
“(Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct.
“Rep. 244), it was held that a decree in favor of
“a patentee, upon a bill in equity against one per-
“son for making and selling a patented machine,
“was no bar to a subsequent suit by the patentee
“against another person for afterwards using the
“same machine within the term of the patent;
“that while a license to make, use, and sell ma-
“chines gives the licensee the right to do so
“throughout the term of his patent, and has the
“effect of wholly releasing them from the mo-
“nopoly, and discharging all claims of the patentee
“for their use by anybody, *an infringer does not,*
“*by paying damages for making and using a ma-*
“*chine in infringement of a patent, acquire any*
“*right himself to a future use of the machine.*
“‘On the contrary, he may, in addition to the pay-
“‘ment of damages for past infringement, be re-
“‘strained by injunction from further use, and,
“‘when the whole machine is an infringement of
“‘the patent, be ordered to deliver it up to be de-
“‘stroyed.’ The court in this case cites with ap-
“proval the case of Penn. v. Bibby, L. R. 3 Eq.
“308, in which the chancellor said that ‘the patent
“‘is a continuing patent, and I do not see why
“‘the article should not be followed in every man’s
“‘hands until the infringement is got rid of. So
“‘long as the article is used, there is a continuing
“‘damage.’ We do not see why the same prin-
“ciple does not apply to one who purchases of the
“manufacturer for the purpose of reselling to con-
“sumers. Indeed, it is difficult to see how this
“case can be reconciled with the language of the
“courts in Spaulding v. Page, 4 Fish. Pat. Cas.
“641; Gilbert etc. Co. v. Bussing, 12 Blatchf. 426;
“Perrigo v. Spaulding, 13 Blatchf. 391; Booth v.
“Seevers, 19 O. G. 1140. So, in Allis v. Stowell,
“16 Fed. Rep. 783, in which the injunction was

“denied, it was intimated that, ‘where a patentee
“‘recovers from an infringing manufacturer full
“‘damages and profits on account of the infringe-
“‘ment, the purchaser from such manufacturer,
“‘who is a user of the machine, will be protected
“‘in such use against a suit for infringement, as
“‘he would be if he were a licensee from the
“‘patentee.’ In this view of the law it was held
“that, to prevent a multiplicity of suits, the court
“might, in a proper case, and on proper showing,
“require the prosecution of suits between a pat-
“entee and a mere user of a patented machine to
“be suspended, to await the result of the suit be-
“tween the patentee and the principal infringer
“from whom the user purchased this machine,—
“a doctrine in which we fully concur, although we
“think the application should be made to the courts
“in which these suits are pending. *The cases of*
“*Ide v. Engine Co.*, 31 Fed. Rep. 901, and *Na-*
“*tional Cash Register Co. v. Boston Cash Indi-*
“*cator Co.*, 41 Fed. Rep. 51, *see to have been de-*
“*cided upon the authority of the prior cases, and*
“*without the attention of the court being called to*
“*the case of Birdsell v. Shaliol, above cited.* Upon
“the other hand, in *Chemical Works v. Hecker*, 11
“Blatchf. 552, it was held, by Mr. Justice Blatch-
“ford, that the court had no jurisdiction of a bill
“filed by a patentee to assume to regulate the con-
“duct of the plaintiffs by injunction, except as
“regards the proceedings in the particular suit.
“To grant the injunction asked for, would be
“to turn the defendant into the plaintiff, and the
“plaintiff into the defendant, and to administer
“independent affirmative relief in favor of a party,
“without his coming into court as an actor, by
“bill or other pleading containing allegations
“capable of being put in issue by formal plead-
“ing, or of being contested on proofs, and to do
“so on matters arising *post litem motam.* See,
“also, *Asbestos Felting Co. v. U. S. etc. Felting*
“*Co. etc.*, 13 Blatchf. 453.”

“The view we have taken of the case of *Birdsell v. Shaliol*, seems to be supported by the opinion of Judge Coxe, in *Tuttle v. Matthews*, 28 Fed. Rep. 98, in which a similar application for an injunction was denied upon the authority of that case.

“There is undoubtedly great force in the argument that a defendant manufacturer, who has agreed to defend suits brought against his customers, and indemnify them against damages obtained by their selling his machines or device, ought not to be vexed by a multiplicity of suits in different parts of the country. But, in view of the case of *Birdsell v. Shaliol*, it is not easy to see how the recovery of damages from the defendant for manufacturing and selling would prevent the recovery of other substantial damages from the defendant's vendees for their profits upon reselling the patented articles. *If the recovery of damages from the manufacturer does not operate as a license to use the patented article*, or, in the language of the Supreme Court in *Bloomer v. McQuewan*, 14 How. 549, to pass it out of the limitation of the monopoly, *there would seem to be no reason for enjoining him from prosecuting anyone trespassing upon his domain*. The risk of being mulcted in costs will ordinarily be sufficient to prevent the patentee from bringing any great number of suits until his patent has been judicially established.”

The next decision supporting complainant's theory and interpretation of *Birdsell v. Shaliol*, is that of Circuit Judge Lacombe, in

New York Filter Co. v. Schwarzwald, 58 Fed. 577-79,

in which the court says:

“Counsel for the defendant corporation cites the following authorities in the federal courts in support of his contention, which may be briefly re-

“ferred to: *Emack v. Kane*, 34 Fed. Rep. 46. In
“that case the court evidently reached the conclu-
“sion that the circulars were not issued because
“the owner of the patent ‘believed that his patent
“‘was infringed, and intended to prosecute for
“‘such infringement,’ but ‘solely to intimidate and
“‘frighten customers away from the manufacturer,
“‘and with no intention of vindicating the validity
“‘of the patent by a suit or suits.’ In that case
“the owner of the patent had dismissed three suits
“brought against users as soon as the manu-
“facturer had been made a party thereto, and
“proof had been taken, ‘the dismissals being en-
“tered under such circumstances as to fully show
“that (*Kane*, who issued the circulars) knew he
“‘could not sustain the suits upon their merits’;
“and the circulars, in that case, expressly stated
“that the manufacturer would not be sued. *Allis*
“*v. Stowell*, 16 Fed. Rep. 783; *Ide v. Engine Co.*,
“31 Fed. Rep. 901; *Birdsell v. Manufacturing Co.*,
“1 *Hughes* 64; *National Cash Register Co. v.*
“*Boston Co.*, 41 Fed. Rep. 51,—undoubtedly sus-
“tain defendants’ contention. *But the learned*
“*judges who decided those cases apparently as-*
“*sumed that recovery against the maker of an in-*
“*fringing apparatus, and satisfaction of the dam-*
“*ages and profits awarded against him, would pass*
“*that particular apparatus out of the limitation of*
“*the monopoly created by the patent, and that the*
“*user thereof could not thereafter be interfered*
“*with. The law, however, is settled otherwise by*
“*the Supreme Court. Birdsell v. Shaliol*, 112 U.
“S. 485, 5 Sup. Ct. Rep. 244, *which holds that re-*
“*covery against the maker is no bar to an action*
“*against the user for damages resulting from his*
“*use, and for injunction against further use.*”

In this view that the decisions referred to by the District Court and supporting the theory of law advanced by it, have been overruled by the decision of

the Supreme Court in *Birdsell v. Shaliol*, the court will find complainant is supported by the opinion of Judge Lacombe, in *N. Y. Filter Co. v. Schwarzwald*, 58 Fed. 577;

Judge Brown, in *Kelley v. Ypsilanti Mfg. Co.*, 44 Fed. 19;

Judge Sage, in *U. S. Printing Co. v. American Playing Card Co.*, 70 Fed. 50;

Judge Hand, in *Asbestos Shingle Co. v. Johns-Manville Co.*, 108 Fed. 611-613;

Judge Hazel, in *Eldred v. Breitweiser*, 132 Fed. 251, 252;

Judge Hazel, in *Westinghouse Co. v. Mutual Life Insurance Co.*, 129 Fed. 213, 222;

Judge Ray, in *Van Epps v. International Paper Co.*, 124 Fed. 542, 544;

and the rule thus applied by the foregoing judges has also on the authority of the *Birdsell v. Shaliol* decision been applied by

Circuit Court of Appeals (Circuit Judge Sanborn and District Judges Marshall and W. H. Munger), for the Eighth Circuit, in *Kryptok Co. v. Stead Lens Co.*, 190 Fed. 767, 770;

Circuit Judge Acheson, in *Edison Co. v. Philadelphia Trust Co.*, 60 Fed. 397;

Judge Sage, in *Computing Scales Co. v. National Computing Scale Co.*, 79 Fed. 962, 966;

Judge Wheeler, in *Allington & Curtis Mfg. Co. v. Booth*, 72 Fed. 772;

Judge Cox, in *Tuttle v. Matthews*, 28 Fed. 98;

Judge Ray, in *Gamerwell Co. v. Star Co.*, 199 Fed. 188;

Circuit Court of Appeals (Judges Dallas, Butler, and Wales), for the Third Circuit, in *Philadelphia Co. v. Edison Co.*, 65 Fed. 551;

Judge Benedict, in *Blake v. Greenwood Cemetery Co.* 16 Fed. 676.

Walker on Patents, 4th Ed., section 676, page 276, says:

“Where the money recovered in an infringement suit for unlicensed making and selling of a specimen of a patented thing, is recovered as damages for such making and selling alone; that recovery does not operate as an implied license authorizing the use of that specimen.”

Citing the authorities hereinbefore referred to.

Walker further says:

“The existence of a decree for profits against a manufacturer for making and selling a patented article, does not constitute any defense to a suit for infringement brought against the user of the very same article.”

Hopkins on Patents, page 458, says:

“The recovery and satisfaction of a judgment for damages against one wrongdoer does not ordinarily confer upon him or upon others, the right to continue or repeat the wrong.”

In the case of *Callaghan v. Myers* (128 U. S. 617), the Supreme Court had before it a copyright case. It should be borne in mind that there is a vital distinction between the copyright law and the patent law in that the former secures to the copyright owner only the exclusive right to reproduce (make) and sell and does not grant any right to exclude from use, while the

patent laws grant these three separate and distinct rights. In this *Callaghan v. Myers* decision the Supreme Court held that the resale of second hand books was an infringement of the copyright and must be accounted for, *although the same books and the original sale thereof had been by the same defendant and had been accounted for as infringing*. In other words, that the 156 volumes in issue had originally been made by the defendant and sold by him and full recovery had for such making and sale but that such recovery did not free the books from the copyright and a repurchase by the original infringer and a resale were a separate and independent infringement. It is not seen how this conclusion could be reached if the recovery for the original making and sale operated to free the infringing articles from the copyright, which is the rule applied by the District Court in granting the order appealed from herein. In this *Callaghan v. Myers* case the Supreme Court says:

“The sale of the volume originally prevented
“the purchase from the plaintiff of a lawful vol-
“ume, and the sale of the same infringing volume
“a second time prevented the purchase from the
“plaintiff of another lawful volume. The plaintiff
“was thus twice injured by the acts of the defend-
“ants, and the sales of the second hand volumes
“must be accounted for as if they were first sales.
“Birdsell v. Shaliol, 112 U. S. 485, 487, 488.”

This decision clearly holds that the volumes are not freed from the copyright by recovery of full damages or profits for the making and sale thereof, otherwise if free anyone had a right to resell them. This decision clearly recognizes that the accounting for the

making or printing and the sale of the infringing copyrighted books did not free the books from the copyright monopoly and for this proposition as an authority cites its decision in *Birdsell v. Shaliol*. As complainant interprets this *Callaghan v. Myers* decision, it is simply this: *neither under the copyright law nor under the patent law does the recovery of damages or profits from the manufacturer and seller of an infringing article free the infringing article and render such device free or licensed in the hands of any one and every one by an implied license by operation of law*. This is the direct opposite of the rule applied by the District Court in granting the order under review here.

Under this *Callaghan v. Myers* decision to interpret the decision in *Birdsell v. Shaliol* as did the District Court leads to an utter absurdity. The infringing devices manufactured by Mr. Parker would be free and impliedly licensed in the hands of the thirty or forty users; while if Mr. Parker repurchased such freed machines from such users and should attempt to sell such free machines he, Parker, would again infringe complainant's patent under this *Callaghan v. Myers* decision, although selling machines which, according to the District Court, had been freed by an implied license. Does not a device once freed from a patent monopoly by an unrestricted license remain a free machine for its life?

Complainant cannot reconcile the Supreme Court's decision in *Callaghan v. Myers* and its basing such decision upon its decision in *Birdsell v. Shaliol* upon any other hypothesis than that of Judge Lacombe, in *N. Y. Filter Co. v. Schwarzwald* (*ubi supra*), that the re-

covery against a maker is no bar to an action against the user for damages resulting from his use or for injunction against future use.

If the District Court's interpretation of *Birdsell v. Shaliol* is correct and the recovery of judgment for and payment of, full damages or profits fully compensating the patent owner for the loss of his rights appropriated by making and selling by the infringing manufacturer has the same effect as the grant of a license for the future use, while the recovery in the suit against the manufacturer of merely *nominal* damages does not effect such result, then we have the anomolous condition of the complainant being in the position of changing the rule of law applicable to the enjoined suits by simply declining or refusing to put in any evidence before the master as to either damages or profits and thereby requiring a report and judgment of and for simply nominal damages, for then under the District Court's interpretation of *Birdsell v. Shaliol* the infringing machines in the hands of the purchasers or users are not freed or licensed and the complainant may proceed with the suits against such purchasers and users. See also

Bragg v. City of Stockton, 27 Fed. 509.

Complainant has always understood that the recovery of damages, *compensatory* or *nominal*, for a tort, and the payment of the judgment extinguished the cause of action as effectually and completely as the recovery of any amount of compensatory or vindictive damages and the payment of the judgment. Wherein, as a matter of law, there can be any difference, whether the

recovery be for “nominal” damages or for full compensatory damages, in the effect of the judgment and its payment as producing the grant of a license by implication of law, is hard to see. Is it not the theory of the law that the recovery of nominal damages is solely on the ground that the plaintiff has suffered no actual damage and that nominal damages are in fact fully compensatory in the particular case? See

Lovejoy v. Murray, 3 Wall. 1, 19.

Complainant awaits the citation of a decision holding that the recovery of judgment for nominal damages and its satisfaction, for a tort does not extinguish the right of action for damages arising from such tort.

It is to be noted in this connection that each and every one of the decisions cited by the District Court in support of its conclusion that the recovery from an infringing manufacturer of damages and profits and the payment of the judgment gives the purchaser the same right to use such machines as he would have were he a licensee from the patentee, were rendered prior to the *Birdsell v. Shaliol* decision, except *Kelley v. Ypsilanti Co.*, and as we have heretofore pointed out, the decision in this last case, instead of supporting the lower court, is point blank against this proposition, Mr. Justice Brown saying: “An infringer does not, “by paying damages for the making and use and sale “in infringement of a patent, acquire any right himself “to a future use of the machine,” and in the last paragraph of page 22: “If the recovery of damages from “the manufacturer does not operate as a license *to use* “the patented article, or, in the language of the Su-

“preme Court in *Bloomer v. McQuewan*, 14 How. 549, “to pass it out of the limitation of the monopoly, there “would seem to be no reason for enjoining him from “prosecuting anyone trespassing upon his domain,” and in this connection we call the court’s attention to the fact that Mr. Justice Brown approves the decision of Judge Coxe in *Tuttle v. Matthews* (28 Fed. 98), which holds that

“The owner of a valid patent secures, by virtue “thereof, three substantive rights: *the right to “make, the right to sell, and the right to use the “patented article. He who invades any one of “these rights is an infringer.”*

“The court is now asked to grant an injunction “restraining the complainants and their agents “from interfering with the defendant’s customers “in the use of the harrows sold to them by him. “The owner of a valid patent secures, by virtue “thereof, three substantive rights: the right to “make, the right to sell, and the right to use the “patented article. He who invades any one of “these rights is an infringer. *Birdsell v. Shaliol*, “112 U. S. 485, S. C. 5 Sup. Rep. 244. The chief “value of many patented machines is in their use. “If a recovery against a manufacturer dedicates “the machine to the public so that it can thereafter “be used by all with impunity, the ‘exclusive right’ “of the patentee does not exclude the most danger- “ous trespasser upon his property.”

In this connection the attention of this court is called to the fact that this decision of Mr. Justice Brown has been repeatedly cited in the cases heretofore referred to as interpreting the *Birdsell v. Shaliol* decision as complainant here interprets the same and in diametrical opposition to the citation thereof by the District Court as supporting the position taken by the District Court

in this case. Complainant submits that complainant is thus supported by each of the decisions above referred to in complainant's interpretation of Mr. Justice Brown's said decision.

The rule applied by the District Court has never been applied by any court in this country since the decision in *Birdsell v. Shaliol* and this is significant of the uniformity of opinion that the decision in *Birdsell v. Shaliol* has reversed the rule of the old cases or decisions cited by the District Court and is due also to the fact that the courts since that decision have recognized the distinction of the three rights of exclusion granted by letters patent for inventions, to-wit, the right of exclusion from *manufacturing*, the right of exclusion from *selling*, and the right of exclusion from *using*, and that the recovery for one of these does not justify the invasion of the other right or the continuance of the invasion of either of the other rights.

Complainant cannot harmonize a rule that the payment of profits and damages for the making and selling of an infringing device frees such device in the hands of the purchaser, when such a recovery against one who makes the article for himself and uses it cannot and does not so free such device. In this connection attention is particularly called to the decision of Judge Sawyer, reported in

Bragg v. City of Stockton, 27 eFd. 509, 510.

Judge Sawyer particularly refers to the decision in *Birdsell v. Shaliol* as authority that the recovery against the making and using of an infringing article

does not give the infringer any right to continue such use.

Defendants have attempted to make much of the fact that complainant has been a manufacturer and seller of the graders and has in the past secured his profit and return from the patent in suit by the sale of such graders, and the District Court has given great weight to this fact. This fact in no wise compels him to accept any sum whatever as a license fee to authorize *the use* by others of machines which complainant neither made nor sold, nor is complainant under any obligation to, nor is there any presumption of law that he will, continue to secure his profit from the patent in this manner. This fact, therefore, becomes moot so far as determining complainant's right to enjoin *the use* of graders made or sold in infringement of his patent.

The defendant manufacturer has been adjudged to be a pirate so far as the manufacture and sale to defendant Riverside Heights Orange Growers Association of the infringing machines is concerned, and the fact that the defendant manufacturer derived his profit from the manufacture and sale can in law or equity in no manner color the character of the case before the court. What the defendant manufacturer did was unlawful. The manufacture and the sale were each separate infringements and each must be and has been enjoined and each must be accounted for, in a proper case, although, as we have already seen, no accounting can be compelled by complainant herein, except for the joint infringement by the Riverside Heights Orange Growers Association and George Parker, who jointly made and used five machines.

The defendants' motion was based on the ground that the suits against the other users of the infringing machines is an interference with the customers and business of the defendant manufacturer. This is an utter fallacy. The interlocutory decree in this case is a decree against this manufacturer and his joint tortfeasor, the Riverside Heights Orange Growers Association, for the making and use of five of these machines. This court has found that this is not the business of the defendant manufacturer, but that it was the business of the complainant, which business has been interfered with and unlawfully appropriated by the defendant Parker. It is therefore clear that there is nothing in the record upon which the court can base a finding of any interference with the legitimate business of the defendant Parker. On the contrary, the decree of this court is to the legal effect that such business was complainant's business. There is not a scintilla of evidence upon which even a suspicion can be had, much less a finding of fact or conclusion of law, that complainant is proposing vexatiously to interfere with any lawful business of the defendant manufacturer.

Complainant has endeavored now for four years to stop this piracy upon his letters patent and yet there are approximately one hundred of the infringing machines in use in infringement of his letters patent, and this although this court has held that such construction of machine is an infringement of complainant's patent and that there is no defense on the merits. Complainant submits that it is hardly fair to characterize complainant's attempt to protect his property as "oppressive." On the contrary, submits that the action of the

District Court in refusing him any relief whatever and compelling him *to wait, wait, wait*, although admitting that the defendants in the thirty-four suits enumerated in the injunction order [*Transcript*, pages 53-54] are continuing to use infringing machines, and admitting that at the time of such injunction order had acquired no right to continue such use, is not doing equity to complainant. In this connection complainant calls particular attention to that portion of the opinion of the District Court found in paragraph 4 thereof [*Transcript*, page 67], in which the court says:

“While the pendency of a suit for infringement
“against the manufacturer is no bar to a suit
“against users of machines bought from the manu-
“facturer, still, if the patentee sues the manu-
“facturer for profits as well as damages, a court
“of equity, in a proper case, will restrain the suit
“against the users until the determination of the
“suit against the manufacturer. (*Birdsell v.*
“*Hagerstown A. I. Mfg. Co.*, 1 *Hughes* 64, 3 *Fed.*
“*Cases* 450, case No. 1437; *National C. R. Co. v.*
“*Boston C. I. & R. Co. et al.*, 41 *Fed.* 51.)”

Complainant submits that the District Court has misconstrued this rule. It is at its most nothing more than a rule that until the *validity* of the patent has been determined and the question of *infringement* has been determined, where suit is pending against the manufacturer the patent owner will not be permitted to simultaneously prosecute separate suits against users. But this rule has no application to the defendants' motion or the order appealed from. The validity of complainant's patent has been established, not only by the decision of this court, but by the refusal of the Supreme Court to review the decision of this court on *certiorari*.

Likewise the question of infringement of complainant's patent by the said graders has likewise been determined, so that *under the rule referred to the suit has been determined*. It is submitted that the rule does not refer to the accounting, which is merely incidental to the equitable relief.

Complainant submits that the same error exists in the opinion and conclusion of the District Court in paragraph 3 thereof, particularly in its application of the quotations appearing on page 66 of the transcript of record from *Kelley v. Ypsilanti Mfg. Co.*, in which the District Court quotes *inter alia*:

"In this view of the law it was held that, to prevent a multiplicity of suits, the court might, in a proper case, and on proper showing, require the prosecution of suits between a patentee and a mere user of the patented machine to be suspended, to await the result of the suit between the patentee and the principal infringer from whom the user purchased this machine,—a doctrine in which we fully concur, although we think the application should be made to the courts in which these suits are pending."

This language simply refers to this same rule of law, that the patent owner must await the result of the suit as to the validity and infringement before proceeding against the users. It is the same rule that the court has erroneously applied in paragraph 4 of its opinion just referred to and discussed.

But even this rule has been modified by the later authorities, and was not applied by Justice Brown in the *Ypsilanti* case.

There is another extremely erroneous statement in the opinion or conclusion of the District Court. Re-

ferring to the last of paragraph 3 of such opinion, and particularly to the paragraph commencing with the last line of page 66 of the transcript of the record, the District Court says:

“*The distinction between full and partial compensation*, that is, between payment of profits and “damages and payment of damages alone, seems “to be recognized also in a quotation made in complainant’s brief from Walker on Patents, 4th “edition, section 676, page 276, as follows:

“ ‘Where the money recovered in an infringement “ ‘ment suit for unlicensed making and selling of a “ ‘specimen of a patented thing, is recovered as “ ‘damages for such making and selling alone; that “ ‘recovery does not operate as an implied license “ ‘authorizing the use of that specimen.’ ”

It is submitted that this is a totally erroneous interpretation of the language of the text writer. The distinction that Mr. Walker makes is not a distinction between the recovery of profits and damages as opposed to damages alone, but the distinction between the recovery for the unlicensed *making and selling alone* and the infringement *by use*.

This suit is pending in a court of equity and is to be judged and decided by equitable principles and doctrines. Complainant submits that the District Court abused a sound legal discretion in granting the injunction order. Said court should have granted to complainant preliminary injunctions against each of such users and compelled them to respect complainant’s property and not use the same *until they had acquired a right so to do*. This would have been equity. Complainant submits, therefore, that even if the District Court’s interpretation of the law could be sustained, its

order and action was inequitable and erroneous as giving the admitted infringers an unfair advantage of complainant and complainant's property. If some day by operation of law a license is granted to these infringers to continue the use of the infringing machines, should they not in equity and good conscience be compelled to await the acquisition of such license before being allowed further use against complainant's will?

There is still another reason which requires at least a partial reversal of the injunctive order of the District Court. It is clear from the opinion of that court that no license has yet come into existence by operation of law to free the machines in the hands of the users. It may never come into existence. There are a number of users who have not been sued. The litigation may be drawn out to such a time before such a license by operation of law is effective or is determined not to become effective, either by failure of the complainant to prove full damages or full profits or the failure of payment of the final judgment as affirmed on appeal, that the statute of limitations will run against the claims of complainant for past use and future use of the infringing machines by these others against whom suits have not been brought. It is well settled that the injunction does not stay the running of the statute of limitations. (*Kelley v. Ypsilanti etc. Co.*, 44 Fed. 23.)

It is inequitable that complainant should be compelled to lose his rights on the mere chance of such judgment being full or being paid. For, as said by Mr. Justice Brown in

Kelley v. Ypsilanti Dress Stay Co., 44 Fed. 22:

“Upon the other hand, in *Chemical Works v. Hecker*, 11 Blatchf. 552, it was held, by Mr. Justice Blatchford, that the court had no jurisdiction of a bill filed by a patentee to assume to assume to regulate the conduct of the plaintiffs by injunction, except as regards the proceedings in the particular suit. ‘To grant the injunction asked for, would be to turn the defendant into the plaintiff, and the plaintiff into the defendant, and to administer independent affirmative relief in favor of a party, without his coming into court as an actor, by bill or other pleading containing allegations capable of being put in issue by formal pleading, or of being contested on proofs, and to do so on matters arising *post litem motam*.’ See also *Asbestos Felting Co. v. U. S. etc. Felting Co., etc.*, 13 Blatchf. 453.”

For this reason at least partial reversal and modification of the order appealed from, with costs, should be ordered.

The injunction order appealed from is also too broad in its term to be justified by the rule of law attempted to be applied. It enjoins complainant “from bringing any other suit or suits against users of machines manufactured in substantial accordance with Letters Patent of the United States No. 997,468,” whether manufactured or sold by either of these defendants. It cannot be pretended that the judgment in this case frees all machines that can be made by anyone embodying such Parker patent construction. For this reason modification of the order is required, and as it has been necessary to bring this cause here on appeal to secure such modification, complainant should recover his costs.

Complainant submits, therefore, that the order appealed from should be reversed for each of the following reasons:

1. No accounting in this suit can be had of any acts of the two defendants herein which are not the joint torts of these defendants, nor can any profits or damages (whichever may be elected by complainant) be recovered except such arising out of the joint torts of the two defendants herein.

2. The recovery of full damages or full profits from defendant Parker on account of the manufacture or sale or both, of all of the machines involved in the suits enjoined would not by operation of law grant to the purchasers thereof an implied license to continue the use thereof; the continuation of such use being a separate infringement and tort and should be enjoined.

3. That the injunction is premature. Equity demands that the rights of the parties be at least maintained in *status quo*. That he who seeks equity must do equity. The defendants in the enjoined suits have not acquired any right to continue use. Their continuance of use is a continuing infringement and unlawful and until each of such defendants actually acquire a right complainant in equity and good conscience is entitled to orders of this court compelling each of such defendants to respect and leave his property alone.

4. The order must be reversed at least in part to protect complainant against the statute of limitations so that he will not suffer loss. It is necessary in order to protect his rights that he should bring suits against all having infringing machines and this before the

statute runs, otherwise he cannot secure damages or profits for at least part of the infringing use.

5. The injunctional order must be at least modified, as it is so broad as to prevent complainant from bringing suit against other infringers who are using the same construction of machine set forth in the Parker patent, but who have not purchased such machines from the defendant Parker.

6. The order appealed from must be reversed for the reason that this court in this suit was without jurisdiction to make such an order.

Kelley v. Ypsilanti Dress Stay Mfg. Co., *supra*;
Chemical Works v. Hecker, 11 Blatchf. 552;
Asbestos Felting Co. v. U. S. Felting Co., 13
Blatchf. 453.

Respectfully submitted,
FREDERICK S. LYON,
Solicitor for Complainant, Appellant.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FRED STEBLER,

Appellant,

vs.

RIVERSIDE HEIGHTS ORANGE
GROWERS' ASSOCIATION
and GEORGE D. PARKER,
Appellees,

In Equity.
No. 2394.

and

FRED STEBLER

vs.

SUNDRY DEFENDANTS, in Cases Nos. A-43, 44,
45, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 62, 63,
64, 65, 66, 67, 70, 71, 73, 74, 75, 76, 77, 78, 86,
90, A-8 and Circuit Court No. 1675.

Brief on Behalf of Appellees.

This is an appeal from an order of the United States District Court for the Southern District of California, Southern Division, enjoining and restraining Complainant—Fred Stebler (Appellant herein) until final decree in Equity suit No. 1562 from the prosecution of the above numbered thirty

some equity suits against users of an infringing device manufactured and sold by George D. Parker, one of the defendants to said suit No. 1562, and one of the appellees herein.

The order of the Court was based on a finding that "The suits against users, thirty-one in number, and similar suits which complainant threatens to bring, are, and would be, I think, under all circumstances of this case, oppressive."

The order enjoining and restraining the appellant herein was applied for by the appellees to prevent the enormous expense incident to the prosecution of a multiplicity of suits pending in the same Court as the parent case No. 1562, in which suit George D. Parker, one of the appellees herein, is liable as manufacturer for each and every infringing device used by the defendants to the said various suits, and from whom on accounting full recovery may and will be had.

The order appealed from appears on page 60 of the transcript of record, and the petition for said order on page 38. The said petition is supported by the uncontradicted affidavit of George D. Parker (one of the appellees herein), page 46 of the printed record.

For the convenience of this Court and as a recital of the facts on which the motion for the restraining order was applied for, a full copy of the petition is herewith presented.

“DEFENDANTS’ PETITION TO ENJOIN
PROSECUTION OF SUITS FOR
INFRINGEMENT.

To The Honorable the Judges of the above entitled Court:

Comes now the above named defendants and give this Honorable Court to understand and be informed:

I.

That the above entitled suit is for the infringement of Reissue Letters Patent of the United States No. 12297, particularly claims 1 and 10 thereof, by defendant Parker as manufacturer and seller and the defendant Riverside Heights Orange Growers’ Association as user of a certain Fruit Grader Machine, manufactured and sold to it by the said defendant Parker.

II.

That after full trial and hearing of said suit this Court signed, filed, and entered on Sept. 17, 1912, a decree dismissing the Complainant’s Bill of Complaint.

III.

That thereafter the complainant duly appealed from said Decree of Dismissal to the United States Circuit Court of Appeals for the Ninth Circuit, and said Appeal was docketed as No. 2232.

IV.

That said Appeal case No. 2232 came on for hearing at the October Term, 1912, of said Court of Appeals, and thereafter in due course said Court made and entered its decree reversing the decree of dismissal of this Court of Sept. 17, 1912.

V.

That thereafter the said United States Circuit Court of Appeals for the Ninth Circuit, upon motion of defendants stayed its mandate for a time sufficient to enable said defendants to present a Petition to the Supreme Court of the United States for a Writ of Certiorari.

VI.

That said defendants duly presented their said Petition for a Writ of Certiorari to the Supreme Court of the United States.

VII.

That said Petition was by said Supreme Court of the United States denied.

VIII.

That upon said denial of said Petition as above mentioned in paragraph VII, the complainant herein caused the Mandate of the United States Circuit Court of Appeals to be issued.

IX.

That said complainant duly presented said Mandate to this Court and the same was by this Court duly received and spread upon its minutes.

X.

That pursuant to said Mandate this Court on or about Nov. 5, 1913 made and entered its Interlocutory Decree, vacating its previous decree of dismissal of Sept. 17, 1912, holding title to the patent sued on to be vested in complainant, holding the patent sued on valid, finding infringement of claims 1 and 10 thereof by the defendants herein; holding complainant to be entitled to recover from said defendants and each of them the profits, gains and advantages derived from said infringement, refer-

ring the accounting thereof to a Master, and granting a perpetual injunction against said defendants.

XI.

That said Interlocutory Decree last mentioned is now in full force and effect, but that no steps have, up to the present, been taken by said complainant in the matter of said accounting nor has the Master made any report thereof.

XII.

That subsequent to the rendition of the decree of the United States Circuit Court of Appeals for the Ninth Circuit and before the said Interlocutory decree of this Court, complainant brought in this Court a large number of suits in equity upon the said Reissue Letters Patent, against various other defendants as infringing users of the said machines manufactured and sold by the defendant Parker herein, said suits being as follows, to-wit:

Fred Stebler vs. Pomona Fruit Growers Exchange, No. A-44.

Fred Stebler vs. Whittier Citrus Association, No. A-45.

Fred Stebler vs. Indian Hill Citrus Association, No. A-49.

Fred Stebler vs. El Camino Citrus Association, No. A-50.

Fred Stebler vs. Colton Fruit Exchange, No. A-52.

Fred Stebler vs. Sierra Madre La Monda Citrus Association, No. A-53.

Fred Stebler vs. Claremont Citrus Association, No. A-54.

Fred Stebler vs. La Verne Orange Growers Association, No. A-55.

Fred Stebler vs. Lyman V. W. Brown, No. A-56.

Fred Stebler vs. Placentia Orange Growers' Association, No. A-70.

Fred Stebler vs. San Dimas Orange Growers' Association, No. A-71.

Fred Stebler vs. I. L. Lyon & Sons, No. A-73.

Fred Stebler vs. Elephant Orchards, No. A-74.

Fred Stebler vs. El Cajon Citrus Association, No. A-77.

Fred Stebler vs. Orange Heights Fruit Association, No. A-78.

Fred Stebler vs. Fernando Fruit Growers' Association, No. A-86.

Fred Stebler vs. Antelope Heights Orange Company, No. A-8, in the Northern Division of this Court.

Fred Stebler vs. Redlands Heights Orange Growers' Association, No.

Fred Stebler vs. Charles C. Chapman, No. A-64.

Fred Stebler vs. Covina Orange Growers' Exchange, No. A-66.

Fred Stebler vs. Walnut Fruit Growers' Association, No. A-57.

Fred Stebler vs. Pattee & Lett Company, No. A-51.

Fred Stebler vs. The West Ontario Citrus Association, No. A-65.

Fred Stebler vs. Anaheim Orange Growers' Association, No. A-43.

Fred Stebler vs. Edmund Peycke Company, No. A-67.

Fred Stebler vs. La Habra Citrus Association, No. A-62,

and has also brought another suit upon said patent against this defendant George D. Parker, entitled: Fred Stebler vs. George D. Parker, No A.-90.

XIII.

That all of said defendants in the said suits mentioned in paragraph XII (exclusive of George D. Parker in the suit last named), are customers of the said George D. Parker, one of the petitioners herein, and that the acts of infringement complained of in said suits, are the use by said de-

fendants of Fruit Grading Machines manufactured by the said George D. Parker and sold by him to said defendants, and are the same kind of machines held in this suit to be infringements, and are subject to the accounting against the said Parker, still to be had in the present suit.

XIV:

That the said complainant Fred Stebler has threatened and still threatens and continues to threaten to bring many other similar suits against the customers of the said Parker, and that unless restrained by this Court, will bring such suits, and will prosecute the same and will continue to prosecute the suits heretofore brought against said customers.

XV.

That your petitioner, the said George D. Parker, is financially able to respond to any judgment which may be rendered against him on the accounting in this case, and that whereas all of the machines complained of in the suits against his customers as aforesaid, are machines made and sold by him, the said Parker, they are each and all subject to said accounting and must be accounted for by him in this case.

XVI.

That your petitioner Parker shows unto your Honors that complainant Stebler is a manufacturer and seller of the patented machines, and is not a user of the same, but that he derives his profit from his said patent solely by the manufacture and by the unconditional sale direct to the users of the said machines, and that upon the satisfaction by said Parker of any judgment of this Court which may be rendered upon the accounting herein, the infringing machines manufactured and sold by him, the said Parker, to his customers aforesaid, will be released from the patent monopoly, and the said

defendants in the various suits above named will not be liable to the said Stebler.

XVII.

That if the said Stebler be not restrained by this Court from continuing the prosecution of the said suits above named, and from bringing other suits of like nature against the customers of said Parker, irreparable injury and damage will result to your said petitioner Parker, by the loss to him of his customers, who on account of the harassment, annoyance, and expense occasioned by the acts of the said Stebler, will fall away from him in his general business and will cease to patronize him in the purchase of any and all packing house machinery of every kind and nature and outside of and wholly foreign to the Grading Machines in question herein, for your petitioner Parker now shows to your Honors that he is a manufacturer and seller of general packing house machinery and that he manufactures and sells many machines and apparatus in this line which have nothing to do with the Fruit Graders held to be infringements herein.

XVIII.

That your petitioner Parker, shows to your Honors that the purpose of the said Stebler in the acts and course he is pursuing and threatens to pursue is to harass and annoy your petitioner's customers and to put them to needless expense and thereby to destroy and break up your petitioner's business, which will result to his irreparable injury and damage.

Inasmuch, therefore, as your petitioners are without any remedy, except in a Court of Equity, your petitioners pray for an order enjoining the said Fred Stebler from further prosecuting the said suits above named, and from bringing any more suits of like nature against the customers of said Parker for the infringement of the said patent by

the use of Fruit Grading Machines made and sold to them by said Parker, said injunction order to be continued until the rendition of the judgment of this Court upon the Master's report on the accounting in the present entitled cause, and your petitioners further pray that your Honors issue a restraining order against said Stebler in the aforesaid matters until this Petition is, upon proper motion herewith accompanying, heard and determined by your Honors.

And your Petitioners will ever pray."

From the facts presented by the above petition it will be observed that appellant herein is the manufacturer of the patented device and derives his sole revenue therefrom by the direct sale of the said device to the users thereof, also that one of the appellees herein (George D. Parker), is the manufacturer and seller of the infringing devices to the users made defendant to the suits as to which the prosecution thereof have been enjoined by his Honor, Judge Wellborn, in the exercise of the discretionary power vested in him in matters of this character.

The motion of defendants to action No. 1562 for the restraining order, the allowance of which is herein complained of, the petition for said order, and the affidavit of George D. Parker (one of the appellees herein) in support of said petition were filed in the District Court of the United States, Southern District of California, Southern Division, on the 25th day of November, 1913.

Thereafter complaint to said action (appellant herein) filed a motion for a preliminary injunction

in connection with each of the thirty-one pending equity suits against the users of the machines supplied by Appellee Parker.

While the two motions were heard by his Honor, Judge Wellborn, on the same day, no decision was rendered denying complainant's motion for a preliminary injunction, the Court withholding its decision on said motion.

In view of the fact of the present case we contend that under the law that where the owner of letters patent elects to manufacture and place the patented device on the market by the direct sale thereof to the user, receiving his only and full compensation or royalty for the continued use of the patented machine by the profit derived by the manufacture of the patented article, he is estopped from proceeding against a mere user on receiving the profit from an infringing manufacturer of the machines sold to the user. In other words, a settlement in full for profits and damages by the infringing manufacturer, releases the user, due to the fact that the owner of the patent has received his full royalty for the use of the machine, the only question being that the owner of the patent receives his full profit on the patented machine being used, and this irrespective as to who pays the same.

This position is not antagonistic to any decision to which our attention has been directed, but, on the contrary, each and every decision is in support

thereof, where the facts presented are the same as the ones appearing in the present case.

We fully realize the right of a patentee to sue an infringing manufacturer, a seller of the patented article, and equally so, a user, but contend that the right of recovery is dependent on the election made by himself as to the manner of marketing the patented article and as to the nature of the suit.

We do not contend that a patent owner can never change his plan of enjoying his monopoly. Our contention is that having made an election of how he will enjoy it, such election will stand as against those who have accepted it, and that any change he may choose to make can apply only to those who come into relation with him and his monopoly after his change.

If we consider the rights of a patentee relative to the monopoly granted by the letters patent and the manner in which his rights are restricted thereunder, no difficulty will be experienced in properly understanding the decisions of the various Courts as applied to meet the varying conditions of each case, for we find that the decisions (some in apparent conflict) are, in fact, reconcilable.

Election as to Marketing the Patented Article.

1. The patentee may place the invention on the market under a royalty agreement.
2. He may elect to market the invention under

specified restrictions, so far as the restrictions are within the law.

3. It is the patentee's right to market the invention under a license agreement, exclusive or otherwise.
4. He may reserve unto himself the manufacture of the patented article and place the same on the market through a seller.
5. He may manufacture, himself, the patented article and sell direct to a user for a given sum, demanding a continuing royalty for the use thereof.
6. He may elect to manufacture and divide the selling monopoly among a number of dealers or users, giving to each the right to use the invention for a specified purpose.
7. He may manufacture the patented article and sell direct to the user, his profit on the sale for use constituting the whole of the royalty fee demanded for the use of the patented invention, which fee when once paid frees the invention of the patented monopoly.
8. He may preserve a sole monopoly under all the granted right, by electing to manufacture for his own use only.

With these various channels open to the patentee or the owner of the patent for the marketing of the patented device, it is not surprising that the decisions of the different Courts appear to be in conflict. Especially is this true when consideration is given to that class of cases where a user of the infringing patented article is liable to the patentee in addition to a recovery from an infringing manufacturer.

We know that a user is not released by a settlement with an infringing manufacturer where

1. The manufacturing patentee markets the article through a selling agent.
2. Where the infringing manufacturer disposes of the article through a selling agent.
3. Where the owner of the patented article manufactures and sells exclusively to a dealer, who in turn disposes to the user on a royalty basis.
4. Where the infringing manufacturer sells exclusively to a dealer, who disposes to a user on a royalty basis.
5. Where the patentee manufacturer sells the article for a given sum, plus a continuing royalty from the buyer for the use thereof.
6. Where the infringing manufacturer sells the infringing article for a given sum, plus a continuing royalty from the buyer for the use thereof.
7. In cases where the manufacturing patentee places the article on the market, exacting an annual royalty for the use thereof.
8. Where the infringing manufacturer places the article on the market, exacting an annual royalty for the use thereof.
9. Where the owner of the letters patent is unable to recover from the infringing manufacturer.

In each of the above cases, excepting the last, there is outstanding a profit due the owner of the patent, which is not disposed of by a settlement with the infringing manufacturer.

In none of the above mentioned classes does the present case fall, for here we have the manufacturing owner of the patent admittedly selling direct to the user for a given profit, and equally so the infringing manufacturer selling direct to the user. Each derives his profit by a direct sale, no restrictions being imposed upon the purchasing user. When the infringing manufacturer settles with the manufacturing owner of the letters patent, the latter receives all he would have received as his royalty for use in case he himself had sold to a user the invention held to be infringed. More he cannot conscientiously seek to recover, and, in the present case, the infringing manufacturer seeks an opportunity to thus reimburse complainant.

Law of the Case.

A review of the decisions discloses seemingly only one case where the conditions here existing prevailed. In said case the order here prayed for (although not granted for other reasons) was recognized as being based on sound law. This was the case of *Allis vs. Stowell*, 16. Fed. 783. Here the Court recognized that where a patentee recovers from an infringing manufacturer *full damages and profits* on account of the infringement, the purchaser from such manufacturer, who is a user of the machine, will be protected in such use against a suit for infringement, as he would be if he were a licensee from the patentee. In this connection the Court states:

“With reference to the Illinois and Michigan

suits, the evident theory of petitioner's counsel is that the defendants in those suits are Stowell's vendees; that the saw-mill dogs used by those defendants in their business and involved in the suits referred to were purchased from Stowell, or Filer, Stowell & Co., and are actually included in part in the accounting in the first suit pending here, and in part in the second suit of *Allis vs. Stowell*; that if Allis shall ultimately have decrees for profits and damages in these cases, and if Stowell shall fully pay and satisfy such decrees, such payment and satisfaction will operate as a license to the Illinois and Michigan parties to use the mill-dogs which they have purchased from him, and to discharge any claim that Allis might otherwise have against them for damages and profits, and for an injunction in the suits which he has commenced in those states; and that to prevent a multiplicity of suits the court will enjoin Allis from prosecuting the cases in other districts until the main controversy between the manufacturers is determined.

“Admitting the general principle involved in this statement of the case to be sound, the question still is, are the necessary facts sufficiently shown to the court to warrant it in applying the principle?

“The rule as to when a recovery by a patentee against an infringer will carry the right to use the patented device, is well stated in *Perrigo vs. Spaulding*, 13 Blatchf. 391, 392, 19 Fed. Cases 260, case No. 10,994. In that case the court said:

“Where the patentee sells his patented instrument or machine for use by others, finding his remuneration in the profit of the sale of the manufactured machine or instrument, it is obvious that his interest is promoted by increasing the sale, and that into his profit enters the value

of the patented invention over and above the cost of manufacture and the ordinary fair profit of the manufacture. Even if no patent or license fee is fixed, the value thereof, as a profit, enters into the selling price, and, if not capable of exact ascertainment, may, nevertheless, be approximated to by estimation, when necessary. When the patentee sells, he receives this profit, and thus obtains full compensation for the article sold, and for the right to use it while it lasts. When, for an infringement, he obtains both the profits and damages, he will be presumed to have obtained a full compensation for all the injury he has sustained, and to be placed in as good a position as if he had made and sold the article itself.

“ * * * When a patentee manufactures and sells his patented article for use, the right to use passes by the sale. If an infringer manufactures and sells, he must account for and pay the profits, which are to be calculated upon the principle that the gain by the appropriation of the patentee's invention is their measure. If there are damages sustained and proved by the plaintiff, beyond the profits made by the infringer, these also may be recovered. But, when a full recovery and satisfaction from one party has been had, the patentee has obtained all that the law gives him, and the particular article or machine, if it be a machine, becomes in effect licensed by the patentee, and may be used so long as it lasts, free from any further claim by the patentee.”

“In effect the same principle was recognized in *Gilbert & Barker Manufacturing Co. vs. Bus-sin*, 12 Blatchf. 426, 10 Fed. Cases 348, case No. 5416; and in *Spaulding vs. Page*, 4 Fisher 641, 22 Fed. Cases 892, case No. 13,219.

“ ‘The recovery of profits and damages from the manufacturers of an infringing machine debars the patentee from recovering from a user for the use of the same machine,’ where

the user purchased the machine from the infringing manufacturer. *Booth vs. Seevers*, 19, O. G. 1140, and cases there cited. These adjudications indicate the law to be, that where a patentee recovers from an infringing manufacturer full damages and profits on account of the infringement, the purchaser from such manufacturer, who is a user of the machine, will be protected in such use against a suit for infringement, as he would be if he were a licensee from the patentee. But this could only be held on a clear showing that the purchaser was using the same patented machine or instrument as that involved in the suit between the patentee and the infringing manufacturer, and that the user was a vendee of such manufacturer; and under the authorities it would seem that to effect such a result it must further appear that the patentee's claim to profits and damages against the manufacturer has been actually paid and satisfied. But, apart from this phase of the question, I am of the opinion that to prevent a multiplicity of suits the court may, in a proper case and upon a proper showing, require the prosecution of suits between the patentee and the mere user of a patented machine to be suspended, and to await the result of a suit pending between the patentee and the principal infringer, from whom the user purchased the machine. Undoubtedly, the court has the power to exercise restraining control over the litigation where the principal parties are before it. The important question in such a case would seem to be, when may the power be rightfully and properly exercised?

"In *Birdsell vs. Hagerstown Agricultural Implement Manufacturing Co.*, 1 Hughes, 64, 3 Fed. Cases 450, case No. 1437, it was held that where a suit upon a patent is pending against the defendant, who is manufacturing and vending an article claimed to be an infringement of the patent, and it appears to the court that the

defendant is responsible for such profits and damages as may be assessed against him as the result of the suit, the court may in its discretion enjoin the complainant from bringing suit against the vendees of the defendant."

There is nothing in *Birdsell vs. Shaliol*, 112 U. S. 485, which holds contrary to the law as expressed in *Allis vs. Stowell*. In fact, this question was not presented to the Supreme Court in *Birdsell vs. Shaliol*, for all the Court was there asked to pass on was the correctness of the lower court in dismissing a suit, where it was shown that only nominal damages had been paid by the manufacturer in a previous suit. Apparently in *Birdsell vs. Shaliol*, the Supreme Court recognized the law as expressed in *Allis vs. Stowell*, by the expression: "*If one person is in any case exempt from being sued for damages for using the same machine for the making and selling of which damages have been recovered against and paid by another person, it can only be when actual damages have been paid, and upon the theory that the plaintiff has been deprived of the same property by the acts of two wrongdoers, and has received full compensation from one of them.*"

From the above we conclude, in view of *Allis vs. Stowell*, that if the patentee elects to receive as his measure of recovery the full licensee fee established by himself, and such licensee fee is paid, it operates to vest in the user the right to use the infringing machine until the particular machine is worn out.

This view of the case was taken by Justice Acheson, in the case of *Stutz vs. Armstrong and others*, 25 Fed. 147, the Court stating:

“It is, indeed, urged in favor of the apportionment of the license fee that the enforced payment thereof does not confer the right to further use the infringing machine. But such is not my understanding of the law. I think the true doctrine, and one reconciling any seeming inconsistencies in the decisions, is this: that while the patentee may, if he choose, confine himself to a recovery for past infringement, and insist that the further use of the infringing machine be enjoined, yet, if he elect as his measure of damages the full license fee established by himself, the payment thereof operates to vest in the defendant the right to use the machine during the term of the patent, or until that particular machine is worn out. *Sickels vs. Borden*, 3 Blatchf. 536; *Suffolk Co. vs. Hayden*, 3 Wall. 315; *Spaulding vs. Page*, 4 Fish, 641; *Emerson vs. Simm*, 6 Fish, 285, 286; *Birdsall vs. Coolidge*, *supra*; *Birdsell vs. Shaliol*, 112 U. S. 485, S. C. 5 Sup. Ct. Rep. 244. This is in harmony with the general rule that satisfaction of a judgment for the value of property wrongfully converted transfers the title to the defendant. 2 Sedg. Dam. (7th Ed.) 421. But to place the matter beyond any future question, the decree here can be so framed as to assure to the defendants, upon making satisfaction, the future use of these machines, or such of them as still exist.”

So, (in this circuit), in the case of *Fisher and others vs. Consolidated Amador Mine Co.*, 25 Fed., at page 201, the Court, speaking through Justice Sawyer, held:

“The answer further alleges that the particular machines used by the defendant, and for the use of which the present action is brought, were purchased by defendant from Hoskins, and that the profits of their manufacture and sale had been included in the decree against Hoskins, and that, therefore, the plaintiffs had received satisfaction for the said machines, and defendant was not liable to plaintiffs for using the same. But the answer nowhere alleges that the Hoskins decree has ever been satisfied by payment or otherwise. In order to be a defense it must allege that said decree has been paid, or otherwise satisfied, as well as that the accounting against Hoskins included the machines in question. In the absence of such allegation the answer does not state a defense. *Gilbert & B. Manuf'g Co. vs. Bussing*, 1 Ban. & A. 621, 10 Fed. Cases 348, case No. 5416; *Birdsell vs. Shaliol*, 112 U. S. 485; S. C. 5 Sup. Ct. Rep. 244; *Steam Stone-Cutter Co. vs. Sheldons*, 21 Fed. Rep. 875; *Walk*, Pat. p. 314. It follows, therefore, that the demurrer must be sustained; and it is so ordered.”

In the above case and that of *Stutz vs. Armstrong*, the Court had its attention directed to *Birdsell vs. Shaliol*, and with said case before it, construed the law to be as announced in *Allis vs. Stowell*, *supra*.

In the case of the *National Cash Register Co. vs. Boston Cash Indicator & Recorder Co. et al*, 41, Fed. 51, Justice Colt not only recognized the law as expressed in *Allis vs. Stowell*, but went beyond said decision by dismissing the suits brought against the users, stating:

“The power of a court of equity, by petition

in the main suit against a manufacturer, to restrain a complainant from bringing further suits against the purchasers or users of a patented article, seems to be recognized in this country, and to be founded upon sound principles of equity. *Ide vs. Engine Co.*, 31 Fed. Rep. 901; *Allis vs. Stowell*, 16 Fed. Rep. 783; *Birdsell vs. Manufacturing Co.*, 1 Hughes, (U. S.) 64. Also the unreported cases of *National Cash Register Co. vs. Bensinger Self-Adding Cash Register Co.*, decided by Judge Blodgett in the Northern District of Illinois, and *Consolidated Store Service Co. vs. Lamson Consolidated Store Service Co.*, decided by Judge Nelson of this District. Recognizing the existence of the power of this court to restrain the complainant, as prayed for, the only question which remains is whether the defendants have made out a case upon their affidavits which entitles them to this relief. I think an examination of the affidavits shows that the numerous suits brought by the complainant against the customers of the defendants are vexatious and oppressive, and that therefore an injunction should be granted as prayed for. Injunction granted."

Appellant has failed to recognize the distinction between the recovery of mere damages and a recovery of damages and profits. Under the decree in the present case, the reference is to a master for an accounting, the appellant will recover full damages and profits.

The distinction between the recovery of mere damages and a recovery of damages and profits is expressly recognized in another of the cases cited by complainant, *Computing Scale Co. vs. National C. S. Co.*, 79 Fed. 962, 966, where the Court says:

“As to the prayer for an injunction against suing users who have purchased from defendants, the complainant’s bill as framed prayed for an injunction and account of profits, as well as for damages against the defendant company. Upon the argument of the motion, the bill, not having been answered, was amended by striking out the prayer for an account of profits, leaving only the claim for damages. This brings the case directly within the rule laid down in *Birdsell vs. Shaliol*, 112 U. S. 485. The right of the complainant, under the authority of that case, to sue the users, is undeniable; and, if the right to sue exists, the right to warn by letters, or by circulars, or by advertisements in newspapers, exists, and cannot be enjoined.”

In *Kelley vs. Ypsilanti, etc., Mfg. Co.*, 44 Fed. 19, the Court says, commencing in last line of p. 21 of the reporter:

“So, in *Allis vs. Stowell*, 16 Fed. Rep. 783, in which the injunction was denied, it was intimated that, ‘where a patentee recovers from an infringing manufacturer full damages and profits on account of the infringement, the purchaser from such manufacturer, who is a user of the machine, will be protected in such use against a suit for infringement, as he would be if he were a licensee from the patentee.’ In this view of the law it was held that, to prevent a multiplicity of suits, the Court might, in a proper case, and on proper showing, require the prosecution of suits between a patentee and a mere user of the patented machine to be suspended, to await the result of the suit between the patentee and the principal infringer from whom the user purchased this machine,—a doctrine in which we fully concur, although we think the application should be made to the courts in which these suits are pending.”

In U. S. Printing Co. vs. American Playing Card Co., 70 Fed.p.53, the same rule is stated thus:

“Where a patentee takes a decree for profits against a manufacturing infringer, he thereby sets the manufactured machine free. The distinction is obvious. In such cases the profits of the infringer are full compensation to the complainant for the wrong done him by the unauthorized manufacture and sale of the infringing machine; but, where there is merely a settlement or judgment for damages, it is only for damages in the past, and has no relation to the future.”

In the present case, we are not denying the right to sue the user, nor have we asked that the suits against the user be dismissed. We say that if appellee Parker makes *full satisfaction*, the user will not be liable.

We contend that in the present case, and under the order referring to the Master for an accounting for *damages* and *profits*, full satisfaction can be made, and we say further that it will be made. We, therefore, simply asked the Court to exercise its discretion in holding back these various suits against the users, until the time is ripe for appellee Parker to render *full satisfaction*. There is nothing in such request nor in its grant which is in conflict with Birdsell vs. Shaliol, *supra*, nor with any of the cases which follow and construe it.

It is needless to analyze these cases with respect to the special facts of each. If this were done, it would be found that in each there were differentiating circumstances rendering each unlike the pres-

ent. We have but to bear in mind that the sole question decided by the Supreme Court is that a user may be sued, and that is the point in each of the cases cited. This we cannot and do not deny, and we did not ask the Lower Court to dismiss.

We fully recognize that while the pendency of a suit for infringement against the manufacturer is no bar to a suit against users of machines bought from the manufacturer, still, if the patentee sues the manufacturer for profits as well as damages (as in the present case), a court of equity in a proper case, will restrain the suit against the users until the final determination of the suit against the manufacturer. (*Birdsell vs. Hagerstown A. I. Mfg. Co.*, 1 Hughes 64, 3 Fed. Cases 450, case No. 1437; *National C. R. Co. vs. Boston C. I. & R. Co.*, et al., 41 Fed. 51.)

In the latter case the Court says:

“The power of a court of equity, by petition in the main suit against a manufacturer, to restrain a complainant from bringing further suits against the purchasers or users of a patented article, seems to be recognized in this country, and to be founded upon sound principles of equity. *Ide vs. Engine Co.*, 31 Fed. Rep. 901; *Allis vs. Stowell*, 16 Fed. Rep. 783; *Birdsell vs. Manufacturing Co.*, 1 Hughes (U. S. 64.) Also the unreported cases of *National Cash Register Co. vs. Bensinger Self-Adding Cash Register Co.*, decided by Judge Blodgett in the Northern District of Illinois, and *Consolidated Store Service Co. vs. Lamson Consolidated Store Service Co.*, decided by Judge Nelson of this District. Recognizing the existence of the power of this Court to restrain the com-

plainant, as prayed for, the only question which remains is whether the defendants have made out a case upon their affidavits which entitled them to this relief. I think an examination of the affidavits shows that the numerous suits brought by the complainant against the customers of the defendants are vexatious and oppressive, and that therefore an injunction should be granted as prayed for."

It is needless to analyze each of the decisions cited by appellant, for in the multitude cited confusion must result, unless we bear in mind the one proposition advanced by us, alone insisted on, namely, that if *full satisfaction* be rendered by appellee Parker, the infringing manufacturer, the users made party defendants to the numerous pending suits will not be liable.

Birdsell vs. Shaliol is not in conflict with this. Around this case of Birdsell vs. Shaliol the present confusion, greatly enhanced by appellant's brief, is gathered. But a correct reading of this Supreme Court case will clarify all the cases which rely upon and profess to follow it, and not one of these cases will be found in opposition to our contention.

We say that Birdsell vs. Shaliol decides only that a user may be sued. It does not decide that *full satisfaction* by the manufacturer does not relieve the user from liability. It even intimates otherwise.

All the cases following Birdsell vs. Shaliol construe the decision there to be that a user may be sued. Not one of them construes it to mean that

full satisfaction by a manufacturer does not release the user. In fact, appellant's citation, to-wit: Computing Scale Co. vs. National Computing Scale Co. 79 Fed. 962, makes the very distinction we urge. (See final paragraph, page 966). In that case the complainant in his suit against the manufacturer amended his bill to ask for *damages* only whereas he had before asked for damages and profits, and this, in the mind of the Court, made a difference. "This," says Judge Sage, "brings the case directly within the rule laid down in Birdsell vs. Shaliol, 112 U. S. 485." What was the difference? It could only be the difference between *full* satisfaction and *partial* satisfaction.

Bragg vs. City of Stockton, 27 Fed. 509, holds that a patentee can choose a law suit or an equity suit. The citation to Birdsell vs. Shaliol is for the purpose of showing that the patentee may have damages for past infringement and an injunction for the future use. This suit was against a user, and there was no question of compensation other than that which might be had from him. The manufacturer was not involved. Even in this case his Honor Judge Sawyer recognized the rule that if the complainant elects to accept a royalty he cannot enjoin future use of the machine, stating that "by paying a royalty the defendant would be entitled to use them until worn out and should not be enjoined from so doing."

Thompson vs. American Bank Note Co. 35 Fed. 203, was a suit in equity against the user of an in-

fringing machine, which was contested on the ground that the machine used was purchased from a manufacturer who had been enjoined in a previous suit and against whom there was a decree.

The Court held that as there was no decree for damages and profits in the suit against the manufacturer, that a decree for damages of manufacture would not release a user, citing *Birdsell vs. Shaliol* in support thereof. However, the Court states that "a decree for the profits of a sale for use, with satisfaction, might relieve the use of the monopoly, but no such decree appears to have been made and such proceeding may not be had." This accords with what was really decided in *Birdsell vs. Shaliol*.

In the present case under consideration, there is a decree for profits and damages for machines manufactured and sold for use, which when disposed of by the infringing manufacturer releases the use of the machine from the patent monopoly.

Consolidated Roller Mill Co. vs. Coombs, 39 Fed. 803, was a suit in equity wherein injunction against a user was asked for. No suit was pending against the manufacturer of the infringing machine, nor had there been a settlement or an offer of settlement to the owner of the patent for the infringing device, such question not having been involved. Under such circumstances the complainant had an undoubted right to a recovery from the user, and the Court properly denied defendant's motion.

There is no conflict between the law as here expressed by the Court and that expressed in *Allis vs.*

Stowell; Stutz vs. Armstrong, et al; Fisher vs. Consolidated Amador Mine, and Bragg vs. City of Stockton.

Kelley vs. Ypsilanti Dress-Stay Mfg. Co., supra, (main case relied on by appellant), was a suit against a seller of infringing goods. Application was made to restrain the commencement and prosecution of suits against customers. The motion was properly denied, inasmuch as the complainant had a right of recovery against a seller of the patented article in addition to the recovery against the manufacturer of the infringing article. Here the infringing manufacturer did not manufacture and sell direct for use, but disposed of the goods through an intermediary; consequently, settlement with the infringing manufacturer would not release the profit due from the re-seller of the infringing device. No such question is here involved, as settlement with the infringing manufacturer for a sale for use gives to complainant manufacturer all he is entitled to for his sale for use.

In New York Filter Co. vs. Schwarzwald, 58 Fed. 577, motion was made to restrain issuing circular letters to customers of the infringing manufacturer. The letters being temperate and courteous in form, the motion was denied.

This case has no bearing on the present motion, except in so far as the Judge says (obiter dictum) that Allis vs. Stowell is contrary to Birdsell vs. Shaliol, but we submit that the learned Judge did not read Birdsell vs. Shaliol in the light of the

question decided. In fact, there was no reason to do so, as the questions presented were not the same. There was no prior suit against the infringing manufacturer wherein *actual damages* had been recovered and paid for the infringing article sold by the manufacturer for use. In fact, the prior suit against the infringing manufacturer had been dismissed by complainant without prejudice, leaving it optional with complainant thereafter to again sue the infringing manufacturer or to sue the user of the infringing device. The Court did not have before it a suit against an infringing manufacturer with a decree and reference to a master for an accounting as to damages and profits, together with a number of suits against users of the infringing machines before the Master on accounting.

The decision of the Court in the case of the Philadelphia Trust Safe Deposit & Ins. Co. vs. Edison Electrical L. Co., 65 Fed. 551, does not decide contrary to *Allis vs. Stowell*. Here again the suit was instituted against a re-seller of the infringing article and, as before stated, the owner of the patent was entitled to a recovery against a re-seller for the profits derived therefrom in addition to a recovery against the infringing manufacturer of the article manufactured for re-sale. All the Court decided in this case was that "a recovery of damages from a defendant, manufacturing and selling, will not prevent the recovery of other substantial damages from the defendant's vendees, for their profits upon re-selling the patented article." This right we

have never questioned, nor do we do so at this time.

The present users are not re-selling agents of the infringing manufacturer, as were the vendees in the above decided case.

Callaghan vs. Meyers, 128 U. S. 617, apparently has no bearing on the present question, the action involving a copyright matter. At the concluding portion of its decision the Court makes reference to the suit of Birdsell vs. Shaliol to uphold the liability of a seller of the infringing copyright matter. The right to sue a re-seller we have not questioned, nor is this involved herein.

In the late case of United States Printing Co. vs. American Playing Card Co. (cited by appellant), 70 Fed. 51, the Court clearly distinguishes between a recovery for past damages and a recovery for profits, holding that where past damages are merely settled for, the complainant has a right to enjoin against future use, but where the patentee or owner of the patent has taken a decree for profits against the infringing manufacturer, he frees the use of the infringing machine. The language of the Court, appearing on page 53, is:

“Where a patentee takes a decree for profits against a manufacturing infringer, he thereby sets the manufactured machine free. The distinction is obvious. In such cases the profits of the infringer are full compensation to the complainant for the wrong done him by the unauthorized manufacture and sale of the infringing machine; but where there is merely a settlement or judgment for damages, it is only for damages in the past, and has no relation to the future.”

Here we have the present case, for the decree of the Court is a reference to the Master for an accounting as to profits to be paid by the infringing manufacturer for the unauthorized manufacture and sale of the infringing machines. On a settlement to the owner of the patent for such profits, such profits are full compensation to the complainant for the wrong done him and sets the manufactured machines free for use.

From the foregoing analysis of the various decisions, we feel the law to be as contended for and upholds the right to the appellees to the order prayed for and granted by the Lower Court.

Answering that portion of appellant's argument as to only five machines being involved in the present action and that the Master's report must be so limited, i. e., to the ones manufactured by defendant Parker for his co-defendant and that a settlement by defendant Parker will not compensate for the machines manufactured and sold to the other thirty-one or more users, against whom suits are now pending for the use of the machines supplied by appellee Parker. The law is contrary to any such contention, for on an accounting the Master has full power under the reference to him in this case, to inquire into and to find all acts of infringement by *either* party, and to base his report in the matter of profits and damages upon all such infringing acts. He will, moreover, apportion his report against the acts of *each* as he finds them.

The Master has full power to inquire into and find all acts of infringement by either party, and to award profits and damages for all such infringing acts. (Robinson on Patents, Section 1153, and note cited: *Tatham vs. Lowber*, 4 Blatch. 86, 23 Fed. Cases 722, case No. 13765.)

The accounting is had up to the time of the report. (*Knox vs. Great Western Quicksilver M. Co.*, 6 Sawyer 430, 14 Fed. Cases 430, case No. 7947). *Hoe vs. Scott*, 87 Fed. 220.

To hold that the Master is restricted in his accounting to some definite number of machines and only to such for which the infringers are jointly liable, would take away from equity the right to prevent a multiplicity of suits for infringing acts. It is inconceivable that an owner of a patent should be required to file some thirty or forty suits to secure that which should be and can be accomplished by a single suit, where all of the alleged infringing machines are manufactured and sold by the same party and the owner of the patent derives his profit from the manufacture and direct sale of the machines to the users thereof.

The Master will not only carry the accounting to the joint acts of infringement, but equally so as to the independent acts of infringement by either party defendant and in his report will apportion accordingly. (*Tatham vs. Lowber*, *supra*).

In *Herring vs. Gage*, 15 Blatch. 124, 12 Fed. Cases 44, case No. 6422, the Court held, p. 47, as follows:

It is the peculiar province of equity, when it has acquired jurisdiction of the subject matter of the controversy, to award in the suit full and complete relief between all the parties. The Master has found the net profits arising from the use of the device by William G. Gage and Frederick A. Gage, down to the date of the order of reference, October 3rd, 1877, to be 28,197, in addition to the profits which accrued to all the defendants jointly. This should have been allowed to the complainants and is now allowed. The decree will provide for a recovery for the complainants, as against all the defendants, of the sum of \$1,161.84 and as against the defendants William G. Gage and Frederick A. Gage for the further sum of \$281.97."

In the present case, based on the Master's report, the decree would provide for a given sum from The Riverside Heights Orange Growers' Association and George D. Parker unto the Complainant, and a further sum from George D. Parker unto the Complainant, which latter sum will provide for each and every machine manufactured and sold by the said Parker independent of The Riverside Heights Orange Growers' Association to the users involved in the thirty some suits, the prosecution of which has been restrained by the granted order herein appealed from.

Under the Order of Reference, and under the law, the Master can find, discover, and report *all* the infringing acts of defendant Parker. To hold otherwise would contravene that beneficent doctrine of equity which frowns on a multiplicity of suits.

The users involved in the thirty some pending suits were charged in the Lower Court with wilful infringement. They purchased the machines in good faith and advisedly so in view of the decision of said Court when holding non-infringement and certainly were not chargeable with bad faith up to such time, and they had every right to continue the use thereafter and purchase additional machines for use. It was not until the rendition of the decision by this Court reversing such decision of non-infringement that appellant had grounds for complaint against the users, and this was not a just grievance until after the decision of the United States Supreme Court relative to the petition of Appellees herein for a *writ of certiorari*, which decision was only rendered last October. Before the refusal of the Supreme Court to grant the said petition, appellant herein commenced the filing of a large number of suits, approximately thirty-seven against the present users of the infringing machines. There certainly was no justification for this multiplicity of suits at such time against the various users, the infringing manufacturer being financially able and willing to account to and pay over to the complainant all profits found by the Master to be due unto him, which when paid gives unto him full remuneration for the machines manufactured and sold.

For convenience we embody herein the decision of

the Lower Court in full, the same being as follows, record, pp. 60-69:

“In the District Court of the United States, for the Southern District of California, Southern Division.

C. C. No. 1562.

FRED STEBLER,

Complainant,

vs.

RIVERSIDE HEIGHTS ORANGE GROWERS’
ASSOCIATION et al,

Defendants.

**Conclusions of the Court on Defendants’ Motion to
Restrain Prosecution of Pending Suits, and the
Institution of Others. [56]**

1.

Complaint has thus far utilized the patent by manufacturing and selling directly to users his patented machines, and in this case has sued for and recovered of infringing manufacturers, who also sold directly to users, profits and damages.

2.

The Master has full power to inquire into and find all acts of infringement by either part, and to award profits and damages for all such infringing acts. (Robinson on Patents, section 1153, and not cited; Tatham vs. Lowber, 4 Blatch. 86, 23 Fed Cases, 722, case No. 13,765.)

The accounting is had up to the time of the report. (Knox vs. Great Western Quicksilver M. Co., 6 Sawyer, 430, 14 Fed. Cases, 430, case No. 7947.)

3.

Where a patentee, situated as complainant, recov-

ers from an infringing manufacturer damages and profits on account of the infringement, and the judgment is paid, the purchaser from such manufacturer, who is a user of the machine, has the same right to such use as he would have were he a licensee from the patentee, that is, the right to use continues during the life of the patented machine. (Allis vs. Stowell, 16 Fed. 783; Gilbert & Barker Mfg. Co. vs. Bussin, 12 Blatch. 426, 10 Fed. Cases, 348, case No. 5416; Perrigo vs. Spaulding, 13 Blatch. 389, 19 Fed. Cases, 260, case No. 10,994; Spaulding vs. Page, 4 Fisher, 621, 22 Fed. Cases, 892, case No. 13,219; Stutz vs. Armstrong et al., 25 Fed. 147; Fisher et al vs. Consolidated A. Mine, etc., 25 Fed. 201; (57) U. S. Printing Co. vs. American Playing Card Co., 70 Fed. 50; Kelley vs. Ypsilanti etc. Mfg. Co., 44 Fed. 19.)

The case on which complainant largely relies, Birdsell vs. Shaliol, 112 U. S. 185, does not conflict, but is in harmony with this doctrine. While the Court, in that case, holds, that payment by an infringing manufacturer of damages only will not vest in him any right to the future of the infringing machine, yet the Court seemingly recognizes the rule, that full compensation to the patentee does free the infringing machine from the monopoly, the language of the Court being:

“If one person is in any case exempt from being sued for damages for using the same machine for the making and selling of which damages have been recovered against and paid by another person, it can only be when actual damages have been paid, and upon the theory that the plaintiff had been deprived of the same property by the acts of two wrongdoers, and has received full compensation from one of them.”

Payment of damages and profits is full compensation.

The law on this subject is well stated in Perrigo vs. Spaulding, *supra*, as follows:

“But, where the patentee sells his patented in-

strument or machine for use by others, finding his remuneration in the profit of the sale of the manufactured machine or instrument, it is obvious that his interest is promoted by increasing the sale, and that into his profit enters the value of the patented invention over and above the cost of manufacture and the ordinary fair profit of the manufacture. Even if no patent or license fee is fixed, the value thereof, as a profit, enters into the selling price, and if not capable of exact ascertainment, [58] may, nevertheless, be approximated to by estimation, when necessary. When the patentee sells, he receives this profit, and thus obtains full compensation for the article sold and for the right to use it while it lasts. When, for an infringement, he obtains both the profits and damages, he will be presumed to have obtained a full compensation for all the injury he has sustained, and to be placed in as good a position as if he had made and sold the article himself. Such is, I think the presumption between parties thus situated, and, if any different rule is sought to be applied in any particular case, it should appear that a recovery has not been sought or obtained for the whole gains of the manufacture as well as for all damages sustained. *Spaulding vs. Page*, before cited; *Gilbert & B. Manufacturing Co. vs. Bussing* (Case No. 5,416). When a patentee manufactures and sells his patented article for use, the right to use passes by the sale. If an infringer manufactures and sells, he must account for and pay the profits, which are to be calculated upon the principle that the gain by the appropriation by the patentee's invention is their measure. If there are damages sustained and proved by the plaintiff, beyond the profits made by the infringer, these also may be recovered. But, when a full recovery and satisfaction has been had, the patentee has obtained all that the law gives him, and the particular article or machine, if it be a machine, becomes, in

effect, licensed by the patentee, and may be used so long as it lasts, free from any further claim by the patentee."

To the same effect, in *Spaulding vs. Page*, *supra*, the Court says: [59]

"Where a patentee does not use the patented machine himself, nor establish a patent fee, but manufactures the patented article, and sells at fixed prices, seeking his compensation in the profits of the manufacture and sale at such fixed prices, and another party infringes the patent by making and selling the patented article; and where the patentee sues the party so infringing, and claims to recover, and does recover the full amount of profits which he himself would have obtained on said articles had he manufactured and sold them at his ordinary prices, by such claim and recovery he adopts the sale made by the party infringing, and the right to use the specific article so sold, and for which the recovery has been had, vests in the purchaser."

In *U. S. Printing Co. vs. American Playing Card Co.*, *supra*, another case cited by complainant, the same rule is stated thus:

"Where a patentee takes a decree for profits against a manufacturing infringer, he thereby sets the manufactured machine free. The distinction is obvious. In such cases the profits of the infringer are full compensation to the complainant for the wrong done him by the unauthorized manufacture and sale of the infringing machine; but, where there is merely a settlement or judgment for damages, it is only for damages in the past, and has no relation to the future."

The distinction between the recovery of mere damages and a recovery of damages and profits is expressly recognized in another of the cases cited

by complainant, Computing Scale Co. vs. National C. S. Co., 79 Fed. 962, 966, where the Court says:

“As to the prayer for an injunction against suing users [60] who have purchased from defendants, the complainant’s bill as framed prayed for an injunction and account of profits, as well as for damages against the defendant company. Upon the argument of the motion, the bill, not having been answered, was amended by striking out the prayer for an account of profits, leaving only the claim for damages. This brings the case directly within the rule laid down in *Birdsell vs. Shaliol*, 112 U. S. 485. The right of the complainant, under the authority of that case, to sue the users, *in* undeniable; and if the right to sue exists, the right to warn by letters, or by circulars, or by advertisements in newspapers, exists, and cannot be enjoined.”

In *Kelley vs. Ypsilanti etc. Mfg. Co.*, *supra*, another case relied on by complainant, the Court says:

“So, in *Allis vs. Stowell*, 16 Fed. Rep. 783, in which the injunction was denied, it was intimated that, ‘where a patentee recovers from an infringing manufacturer full damages and profits on account of the infringement, the purchaser from such manufacturer, who is a user of the machine, will be protected in such use against a suit for infringement, as he would be if he were a licensee from the patentee.’ In this view of the law it was held that, to prevent a multiplicity of suits, the Court might, in a proper case, and on proper showing, require the prosecution of suits between a patentee and a mere user of the patented machine to be suspended, to await the result of the suit between the patentee and the principal infringer from whom the user purchased this machine,—a doctrine in which we fully concur, although we think the application should be made to the courts in which these suits are pending.”

It should be observed, that this enunciation was by [61] Brown, then District Judge for the Eastern District of Michigan, subsequently Associate Justice of the Supreme Court of the United States, not only an eminent jurist, but one notably learned in the patent law, and that, in the opinion in which the enunciation was made, *Birdsell vs. Shaliol*, *supra*, was considered and discussed.

The distinction between full and partial compensation, that is, between payment of profits and damages and payment of damages alone, seems to be recognized also in a quotation made in complainant's brief from Walker on Patents, 4th edition, section 676, page 276, as follows:

“Where the money recovered in an infringement suit for unlicensed making and selling of a specimen of a patented thing, is recovered as damages for such making and selling alone; that recovery does not operate as an implied license authorizing the use of that specimen.”

4.

While the pendency of a suit for infringement against the manufacturer is no bar to a suit against users of machines bought from the manufacturer, still, if the patentee sues the manufacturer for profits as well as damages, a court of equity, in a proper case, will restrain the suit against the users until the determination of the suit against the manufacturer. (*Birdsell vs. Hagerstown A. I. Mfg. Co.*, 1 Hughes, 64, 3 Fed. Cases 450, case No. 1437; *National C. R. Co. vs. Boston C. I. & R. Co. et al.*, 41 Fed. 51.)

In the latter case the Court says:

“The power of a court of equity, by petition in the main suit against a manufacturer, to restrain a complainant from [62] bringing further suits against the purchasers or users of a patented article, seems to be recognized in this country,

and to be founded upon sound principles of equity. *Ide vs. Engine Co.*, 31 Fed. Rep. 901; *Allis vs. Stowell*, 16 Fed. Rep. 783; *Birdsell vs. Manufacturing Co.*, 1 Hughes (U. S.), 64. Also the unreported cases of *National Cash Register Co. vs. Bensinger Self-Adding Cash Register Co.*, decided by Judge Blodgett in the Northern District of Illinois, and *Consolidated Store Service Co. vs. Lamson Consolidated Store Service Co.*, decided by Judge Nelson of this District. Recognizing the existence of the power of this Court to restrain the complainant, as prayed for, the only question which remains is whether the defendants have made out a case upon their affidavits which entitles them to this relief. I think an examination of the affidavits shows that the numerous suits brought by the complainant against the customers of the defendants are vexatious and oppressive, and that therefore an injunction should be granted as prayed for."

The pending suits against users, thirty-one in number, and similar suits which complainant threatens to bring, are, and would be, I think, under all the circumstances of this case, oppressive, and, accordingly defendants' motion will be allowed to the extent of enjoining complainant from further prosecuting the pending suits, or bringing other similar suits, until final decree herein, or until otherwise ordered by this Court, provided defendants, within five days, file a bond in the sum of Ten Thousand Dollars, with good and sufficient sureties, to be approved by the Clerk of this court, for the payment of any damages and profits that may be adjudged against [63] them in this suit.

Defendants' attorney will prepare an order in conformity with these conclusions, and, after serving a copy on complainants' attorney, submit the original to this Court for its action thereon.

OLIN WELLBORN,
Judge."

CONCLUSION.

It is respectfully submitted, in view of the foregoing, that the Court below did not err in granting the Petition to Enjoin Prosecution Of Suits For Infringement as prayed for, that the same was properly granted, and that in the granting thereof the said Court did not abuse its discretion, and that the order granting the motion to enjoin and restrain the prosecution of the multiplicity of suits therein referred to should, therefore, be sustained. All of which is respectfully submitted.

NICHOLAS A. ACKER,
WILLIAM F. BOOTH,

Counsel for Appellees.

